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In The

Supreme Court of the United States

October Term, 1974

No. 74-476

WILLIE PENN and CHARLES F. FOSTER, JR., individually and on behalf of all persons similarly situated, and

ALABAMA STATE CONFERENCE OF NAACP, INC., a non-profit Alabama corporation, individually and on behalf of its black members and on behalf of the class similarly situated,

Petitioners,

-v.-

JAMES R. SCHLESINGER, individually and as SECRETARY OF DEFENSE, etc., ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOSEPH J. LEVIN, JR.
CHARLES F. ABERNATHY
MORRIS S. DEES, JR.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No.

WILLIE PENN and CHARLES F. FOSTER, JR., individually and on behalf of all persons similarly situated, and

ALABAMA STATE CONFERENCE OF NAACP, INC., a non-profit Alabama corporation, individually and on behalf of its black members and on behalf of the class similarly situated,

Petitioners,

-v.-

JAMES R. SCHLESINGER, individually and as SECRETARY OF DEFENSE, etc., ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Willie Penn, Charles F. Foster, Jr., and the Alabama State Conference of NAACP, Inc., on behalf of its members, respectfully pray that a writ of certiorari issue to review

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the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on July 26, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals, sitting *en banc*, is appended to this petition at 1a. The judgment and panel opinions of the Court of Appeals, the dissenting opinion of which was adopted in its entirety by the court sitting *en banc*, is reported at 490 F.2d 700 (5th Cir. 1974) and is appended at 13a. The order of the United States District Court for the Middle District of Alabama, which is reported at 350 F.Supp. 752 is appended at 46a.

JURISDICTION

The judgment of the Court of Appeals, sitting *en banc*, was entered on July 26, 1974. The petition for writ of certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

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QUESTIONS PRESENTED

I. In a suit brought by current and prospective employees of the federal government charging racial discrimination in employment contrary to 42 U.S.C. §1981 and the fifth amendment to the Constitution, must administrative remedies set up by executive order but unprescribed by §1981 be exhausted before the suit may be filed?

II. In a suit brought by current and prospective employees of the federal government, were administrative remedies adequately exhausted where administrative officers refused to permit the filing of a written complaint, such written complaint being required by administrative regulations in order to pursue further administrative remedies?

III. In a suit brought by current and prospective employees of the federal government, were administrative remedies adequately exhausted where the administrative regulations provided no complaint procedure whatsoever for prospective

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employees discriminated against or for the organization representing them?

IV. In a suit brought by current and prospective employees of the federal government, were administrative remedies adequately exhausted where as to one plaintiff, the administrative officer charged with the duty of informing the aggrieved employee of his right to file a complaint, failed to perform this duty?

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Involved in this case are the fifth amendment to the United States Constitution, 42 U.S.C. Section 1981 and 5 C.F.R. 713, *et seq.* The provisions of 5 C.F.R. 713, *et seq.* are set out in pertinent part at Appendix, p. 101a.

STATEMENT OF THE CASE

Willie Penn and Charles F. Foster, Jr., are civilian employees of the Department of

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Defense at Maxwell Air Force Base, in Montgomery, Alabama. The Alabama Conference of the NAACP is a black membership organization which has sued in the past to protect the right of its members to equal access to public employment opportunities.[1/] Mr. Penn and Mr. Foster brought this action after thay had been repeatedly denied promotions;[2/] the NAACP joined in the suit,

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1/ *See* NAACP v. Allen, 493 F.2d 970 (5th Cir. 1974).

2/ Over a period of seventeen years, dating from 1955, Mr. Penn was consistently denied meaningful job advancement, most recently just eight months before the instant complaint was filed. At that time two white persons with less experience and seniority were chosen over him for a position as procurement analyst. (App. p. 84a.)

Mr. Foster, who served in the Navy for four years as a boiler expert, applied for promotion to a position in the Maxwell A.F.B. steam plant, theretofore an all-white facility widely known as having jobs for whites only. (App. p. 98a.) Mr. Foster was subsequently placed in a clerk position, the salary for which was downgraded for him alone, whites in the category receiving a higher salary. Finally, Mr. Foster, with two years of business school study recently finished, was rejected for two higher procurement positions, his white supervisor choosing instead two white women who had only high school diplomas

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recognizing that the federal government – which had just successfully sued the state for racial discrimination in employment[3] – had an even worse record of racist hiring than the state itself. The plaintiffs named as defendants the officials heading the seventeen federal agencies and departments which showed the most egregious statistical record for hiring blacks.[4]

The defendants twice moved to dismiss the complaint, submitting briefs which argued that the federal officials were protected from suit by sovereign immunity and that the plaintiffs had failed to exhaust their administrative remedies. In response to the first of these motions the plaintiffs added to their complaint

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and were less qualified than he. Indeed, one had so little experience that she was appointed in an "acting" capacity until experience was obtained. (App. p. 100a.)

3/ United States v. Frazer, 317 F.Supp. 1079 (M.D. Ala. 1970).

4/ App. p. 75a.

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paragraphs showing their attempts to resolve their grievances within the administrative complaint process.[5/] Mr. Penn alleged that he had made known to his Equal Employment Opportunity (E.E.O.) Counselor his frustration at non-advancement, but she failed in her prescribed duty to advise Penn of his right to consult an E.E.O. officer who could accept his complaint. (App. p. 96a.) Mr. Foster alleged that he had approached his E.E.O. counselor, who dutifully referred him to an E.E.O. officer, but the E.E.O. officer refused to permit Foster to file a written administrative grievance.[6/] (App. p. 101a.) Since no procedures existed for an administrative complaint by the NAACP, it had taken

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5/ The amended complaint also presented an opportunity for Mr. Foster to join Mr. Penn as co-plaintiff. (App. p. 95a.)

6/ The regulations establishing the complaint procedure required the filing of a written complaint as a prerequisite for taking an appeal to the Civil Service Commission. 5 C.F.R. §713.214 (1971).

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no administrative action that could be set out in the amended complaint. The district court, Johnson, C. J., denied the motions to dismiss (App. p. 61a), but found the issues sufficiently troublesome in light of contrary precedent[7/] that it certified

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7/ *See* Beale v. Blount, 461 F.2d 1133 (5th Cir. 1972), Blaze v. Moon, 440 F.2d 1348 (1971), Gnotta v. United States, 415 F.2d 1271 (8th Cir. 1969) (per Judge, now Justice, Blackmun), cert. denied, 397 U.S. 934 (1970). The plaintiffs presented apparently convincing arguments to show that *Beale* and *Blaze* ignored overriding Supreme Court precedents which established that the sovereign immunity defense is unavailable to defendant federal officials who either act unconstitutionally or ultra vires their authority. *See*, Dugan v. Rank, 372 U.S. 609 (1963); Larson v. Domestic & For. Commerce Corp., 337 U.S. 682 (1949). The Eighth Circuit's decision in *Gnotta v. United States, supra,* noted that the plaintiff's attack on his supervisor's national-origin discrimination "obviously" did not fall within the *Larson-Dugan* exceptions to sovereign immunity. 415 F.2d 127 . The plaintiffs in the case *sub judice* were able to show (1) that racial discrimination was unconstitutional and thus fell within the *Larson-Dugan* exceptions, *see*, Bolling v. Sharpe, 347 U.S. 497 (1954), and (2) that the plaintiff in *Gnotta* had apparently failed to make the key allegation that the claimed discrimination was unconstitutional or exceeded the defendant's authority, *see* Brief for Appellant in Gnotta v. United States, 397 U.S. 934 (1970), denying cert. to 415 F.2d 1271 (8th Cir. 1969).

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them for interlocutory appeal pursuant to 28 U.S.C. §1292(b). (App. p. 46a.) By order entered November 21, 1972, the Court of Appeals granted the defendant federal officials leave to appeal the district court's order.

A panel of the Court of Appeals affirmed Judge Johnson's ruling, one judge dissenting. The federal officials asked and were granted rehearing *en banc*, the full court reversing the panel and adopting the opinion of the panel dissenter as its own. (App. p. 1a.) That opinion held that the plaintiffs had not sufficiently exhausted their administrative remedies, reasoning that the administrative officers' refusal to advise plaintiff Penn of his right to file a grievance and refusal to allow plaintiff Foster to file a written grievance were mere "procedural slipups" which should have been subjected to administrative "self correction." (App. p. 41a.) Judge Tuttle, joined by three

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others, dissented, arguing that exhaustion was not required in suits brought under 42 U.S.C. §1981 and that, in any event, remedies had been exhausted in the instant case.8/

REASONS FOR GRANTING THE WRIT

I.

THE ISSUES PRESENTED CONCERN THE EFFECTIVE OPERATION OF OUR NATIONAL GOVERNMENT'S ADMINISTRATIVE SYSTEM FOR ERADICATING FEDERAL EMPLOYMENT DISCRIMINATION.

The federal government has a substantial and unequivocal commitment to outlawing discriminatory employment practices in its public service occupations. The prohibition against discrimination is set forth in a long string of executive

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8/ By dismissing the complaint for failure to exhaust remedies, the *en banc* court skirted the major issue raised in the district court, the availability of sovereign immunity as a defense for discriminating federal officials.

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orders[9] and federal statutes[10] and even in the Constitution itself.[11] But our decisive legal commitments to ending discrimination is a mockery unless the administrative system which enforces our commitment does its job.

And our present system has indeed failed in its job. Two massive studies undertaken in 1972 came to that conclusion,[12] as did the Congress. In passing the first modern statutory scheme for remedying federal employment discrimination, Congress pointedly alluded to the

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9/ *E.g.*, Exec. Order No. 11478, 34 Fed. Reg. 12985, as amended by Exec. Order No. 11590, 36 Fed. Reg. 7831.

10/ Civil Rights Act of 1866, 42 U.S.C. §1981; 42 U.S.C. §2000e-16; 5 U.S.C. §7151.

11/ U. S. Constitution, Amendment V; *cf.* Frontiero v. Richardson, 411 U.S. 677 (1973).

12/ Public Interest Research Group; BEHIND THE PROMISE: EQUAL EMPLOYMENT IN THE FEDERAL GOVERNMENT (1972); R. Rittenoure, Black Employment in the South: The Case of the Federal Government (contract study no. 81-46-70-24, Manpower Administration, U. S. Dept. of Labor, 1972) [published by the Center for the Study of Human Resources, University of Texas, Austin, Texas].

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failures of the administrative system for handling complaints:

> Th[e] disproportionate distribution of minorities and women throughout the Federal bureaucracy and their exclusion from higher level policy-making and supervisory positions indicates the government's failure to pursue its policy of equal opportunity.
>
> A critical defect of the Federal equal employment program has been the failure of the complaint process. That process has impeded rather than advanced the goal of the elimination of discrimination in Federal employment.13/

While Congress, privately funded reformers, and government-contract researchers have recommended or enacted strong measures for rejuvenating the anti-discrimination complaint procedures, the Fifth Circuit has frustrated that goal by refusing to police the administrative process. Indeed, by sanctioning the wrong-doing of administrative officers and counselors in the case *sub judice*,14/ the Court of Appeals has

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13/ H.R. Rep. No. 92-238, on H.R. 1746, 92d Cong., 1st Sess., 23-24 (1971).

14/ *See* p. 9 *supra*.

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undermined the effectiveness of the entire complaint process. While professing respect for the administrative system, the decision below reinforces those elements which have brought the system disrespect. Only if administrative officers are made to fulfill their duties in processing grievances can the administrative process work.

Although the plaintiff-petitioners' claims arose before the effective date of the 1972 Equal Employment Act, and are prosecuted under the older 1866 Civil Rights Act,[15/] the administrative procedures which petitioners attempted to exhaust are substantially identical to those in force today.[16/] By reviewing and reversing the judgment below, the Court will promote the

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15/ 42 U.S.C. §1981 is derived from the 1866 Act, as was 42 U.S.C. §1982. *See* Tillman v. Wheaton-Haven, 410 U.S. 431, 439, n. 11 (1973); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970).

16/ *See* App. at 38a. n. 2, 40a n. 3.

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effectiveness of the anti-discrimination complaint process, and thereby increase respect for the process and satisfaction with its results. By agreeing that petitioners' need not return again to the administrative procedure, the Court will force the government's equal opportunity administrators to exercise their duties responsibly in the future, at the risk of losing their administrative power.17/ As Judge Tuttle said in his panel opinion, App. at 27a,

> our interpretation of the exhaustion requirement here should help insure that, in the future, federal agencies process such complaints in accordance with their own procedures rather than short-circuiting them into federal court.

17/ To the extent that more effective administration would increase the number of administratively resolved disputes, it would decrease the number of cases which would be filed in federal court by unsatisfied employees. By reviewing and reversing the single case *sub judice*, the Court could act to limit the workload of the lower courts, a goal worthy of promotion by use of the certiorari jurisdiction.

II.

THE COURT BELOW ERRED IN HOLDING THAT THE PLAINTIFFS HAD NOT EXHAUSTED ALL AVAILABLE ADMINISTRATIVE REMEDIES.

In an earlier case concerning federal employment discrimination, the Court below had required exhaustion of administrative remedies, but with the notation that the administrative procedure there available would not have been a "meaningless ritual." *Beale v. Blount*, 461 F.2d 1133, 1139 (5th Cir. 1972). The Fifth Circuit's initial view that foreseeably futile procedures need not be ritualisticly exhausted is supported by substantial other authority.18/

In the case *sub judice*, the plaintiffs went far beyond merely alleging that resort to the

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18/ *See*, *e.g.*, Houghton v. Shafer, 392 U.S. 639, 640 (1968) (per curiam); Eisen v. Eastman, 421 F.2d 560, 568-69 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970); Williams v. Richardson, 347 F.Supp. 544 (W.D.N.C. 1972); 3 K. DAVIS ADMINISTRATIVE LAW §20.07.

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administrative remedies would be futile; they alleged that they had resorted to these remedies, and that they had in fact proved futile. *Cf. Leedom v. Kyne*, 358 U.S. 184 (1958).

Judge Godbold's panel dissent, adopted by the court *en banc*,[19/] thought this allegation insufficient to excuse exhaustion. (App. p. 35a.) But that opinion is based upon a quite basic misunderstanding of the administrative scheme at issue. While Judge Godbold believed that the petitioners should have persevered with their complaints, taking them to the Civil Service Commission, the administrative procedure did not permit such a move. Appeals to the Civil Service Commission were allowed only after the filing of written complaint with the Equal

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19/ App. at 1a.

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Opportunity Officer.[20] Mr. Foster was not even permitted to file his written complaint. (App. p. 101a.) Therefore, he could not have done what the Court of Appeals demanded of him.[21] Mr. Penn was similarly excluded from administrative resolution of his claim.[22]

20/ 5 C.F.R. §§713.214-713.221. The current regulations retain the requirement that the complaint be made in writing in order to make the aggrieved employee eligible for further appeals in the administrative hierarchy. *See* 5 CFR §713.214(a) (1973). Thus the action at issue here — refusal to accept a written complaint — continues to be of overriding importance in the complaint process.

21/ Judge Godbold's opinion referred to the refusal to process Mr. Foster's claim as a "procedural slipup" which could be the subject of "self correction" by higher levels of command within the agency. App. p. 41a. But the administrative procedure in effect did not permit appeals which would correct these "procedural slipups." *See* note 20, *supra*.

22/ When Mr. Penn approached his E.E.O. Counselor she failed in her duty (5 C.F.R. §213(a) (1971)) to send him to the E.E.O. Officer for filing of a grievance. The system not only worked theoretically by imposing information-dispensing duties on such counselors; advice to see them was the only publicly displayed notice to employees. (App. p. 104a.)

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Exhaustion of prescribed remedies is not a wooden formula, but rather requires an understanding of the administrative grievance procedure in question. *McKart v. United States*, 395 U.S. 185, 193 (1969). The court below erred by sternly requiring the petitioners to take appeals and file claims[23/] which the administrative procedure itself did not permit.

III.

THIS CASE OFFERS THE COURT AN OPPORTUNITY TO SETTLE TROUBLING AND LONG-STANDING ISSUES CONCERNING THE APPLICABILITY OF THE EXHAUSTION REQUIREMENT TO FEDERAL VERSUS STATE DEFENDANTS IN SUITS TO PROTECT CONSTITUTIONAL RIGHTS.

23/ The Court of Appeals excluded the NAACP's complaint, filed on behalf of its members who were refused employment, even though it is uncontested that no administrative procedure whatsoever was available to organizational plaintiffs or for unhired persons who had been discriminated against. *See* App. p. 2a, n. 1.

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Two terms ago in *District of Columbia v. Carter*, 409 U.S. 418 (1973), the Court indicated that the old 1866 Civil Rights Act, which had been revitalized in 1968,[24/] applied not only to private and state acts of racial discrimination but to misconduct by federal officials as well. In the course of explaining why the 1870 Civil Rights Act, 42 U.S.C. §1983, did not cover the District of Columbia, the Court specifically distinguished that statute from the 1866 Act. The 1866 Act, said the Court, establishes an 'absolute' bar to all such racial discrimination, private as well as public, federal as well as state." 409 U.S. at 422. (Emphasis added.)

This case presents the Court with its first opportunity to determine how suits brought under the 1866 Act, which prescribes no administrative remedies, should be treated in light of executive orders and more recent legislation which do

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24/ *See* Jones v. Alfred Mayer Co., 392 U.S. 409 (1968).

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require resort to federal administrative remedies.

The Court of Appeals' decision to require exhaustion of federal administrative remedies also raises substantial problems of federalism, for while the court below required exhaustion of federal administrative remedies, exhaustion of state remedies is not required in similar discrimination suits brought against state officials under 42 U.S.C. §1983. *See Wilwording v. Swenson*, 404 U.S. 249 (1971), *McNeese v. Board of Education*, 373 U.S. 668 (1963); *cf. Monroe v. Pape*, 365 U.S. 167 (1961). While the court of appeals below has explained this discrepancy in respect for administrative remedies by pointing out that the federal government is "on record" as opposing racial discrimination,25/ that excuse is readily transparent, for many states whose administrative machinery is ignored by federal judges

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25/ Beale v. Blount, 461 F.2d 1133, (5th Cir. 1972).

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are also on record as opposing racial discrimination. *See* Note, "Exhaustion of Federal Administrative Remedies Under Section 1981 of the Civil Rights Act," 1974 DUKE LAW JOURNAL 408, 421 and n. 69 (April 1974).

On a more general level the instant case, brought under a century-old statute prescribing no administrative exhaustion, also presents fundamental questions as to the very nature of the exhaustion of remedies doctrine as it is applied in the federal courts. Does the exhaustion of administrative remedies doctrine require exhaustion of only congressionally "prescribed" remedies as this Court has often said,[26/] or does the exhaustion doctrine extend to those administrative remedies which are "available" but unprescribed by the statutes creating the cause of action. Those opinions which have extended the

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26/ McKart v. United States, 395 U.S. 185, 193 (1969); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938).

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doctrine to "all available" remedies generally cite for support only decisions from this Court involving Congressionally prescribed remedies.[27/] The petitioners contend that if exhaustion of unprescribed remedies is to be required, it must be made after a principled inquiry into the interests to be served.[28/] The case *sub judice* provides the opportunity for this inquiry in the context of §1981 actions against federal officials.

CONCLUSION

The above premises considered, a writ of certiorari should issue to review and reverse the judgment of the court below, and the case should be remanded to the district court for trial on the merits.

27/ *See, e.g.*, Bolger v. Marshall, 193 F.2d 37, 39 (D.C.Cir. 1951); Ogden v. Zuckert, 298 F.2d 312, 317 (D.C.Cir. 1961) (dissenting opinion).

28/ *See, e.g.*, Monroe v. Pape, 365 U.S. 167 (1961); Home Telephone and Telegraph Co. v. C. of Los Angeles, 227 U.S. 278 (1913). *Compare* Barney v. C. of New York, 193 U.S. 430 (1904), *with* United States v. Raines, 362 U.S. 17, 25-26 (1960).

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Respectfully submitted,

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APPENDIX

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Willie PENN, Individually, etc., et al., Plaintiffs-Appellees,

v.

Melvin R. LAIRD, Individually and as Secretary of Defense, etc., et al., Defendants-Appellants.

No. 72–3684.

United States Court of Appeals,
Fifth Circuit.

July 26, 1974.

A class action was instituted against the United States and heads of government departments and agencies for alleged systematic racial discrimination in hiring and promotion. The United States District Court for the Northern District of Alabama, Frank M. Johnson, Jr., Chief Judge, granted the motion of the government to dismiss but denied a similar motion by the individual government officials, 350 F.Supp. 752. They appealed. A panel of the Court of Appeals affirmed, 490 F.2d 700, but the court en banc held that the plaintiff association, seeking to represent black employees and prospective employees of some federal departments, had an administrative remedy under amended equal opportunity regulations of the Civil Service Commission and was required to exhaust such remedy before suing, though such amended regulations were adopted after the District Court denied the motion to dismiss.

Opinion of panel reversed; order of District Court reversed and cause remanded with instructions to dismiss.

Tuttle, Senior Circuit Judge, dissented and filed opinion in which Wisdom, Lewis R. Morgan and Goldberg, Circuit Judges, joined.

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Civil Rights ⇐13.9

Association seeking to represent black employees and prospective employees of some federal departments in potentially massive class action had administrative remedy under amended equal opportunity regulations of Civil Service Commission, well calculated to ensure ready reception and prompt, fair disposition of discrimination claims, and association was required to exhaust such remedy before suing United States and heads of government departments and agencies for alleged systematic racial discrimination in hiring and promotion, though such amended regulations were adopted after district court denied motion to dismiss.

Appeal from the United States District Court for the Middle District of Alabama.

Before BROWN, Chief Judge, TUTTLE, Senior Circuit Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, RONEY and GEE, Circuit Judges.

PER CURIAM:

For the reasons set out in the dissenting opinion of Judge Godbold, Penn v. Schlesinger, 490 F.2d 700, 707–714 (CA5, 1973), the court en banc concludes that the claims of the individual plaintiffs should have been dismissed for failure to exhaust administrative remedies.[1]

1. The order of the District Court, 350 F.Supp. 752 denying the motion to dismiss did not refer to the status of the Alabama State Conference of NAACP, Inc., which joined in the suit as plaintiff alleging that it sued on behalf of its members and of all blacks in Alabama situated similarly to the individual plaintiffs. Pretermitting the numerous other issues that surround NAACP's claim, it now has an administrative remedy under amended regulations adopted shortly after the District Court denied the motion to dismiss, see 5 Cir., 490 F.2d at 712, footnote 3, and under the circumstances of this case it too should be required to exhaust.

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The opinion of the panel is reversed. The order of the District Court is reversed and the cause is remanded to the District Court with instructions to dismiss the case.

TUTTLE, with whom WISDOM, GOLDBERG and MORGAN, Circuit Judges, join, dissenting:

With deference, I feel that I must dissent from the decision and the opinion of the Court, sitting en banc, in reversing the denial by the trial court of a motion to dismiss this section 1981 suit against the heads of the United States Government departments for racial discrimination in hiring policies, because the named plaintiffs in the class action had failed to exhaust certain Civil Service administrative remedies available to them.

There are two important issues presented to the Court, only one of which could be considered by the original panel because of the rule of stare decisis within the Circuit. The original decision is now reversed by the per curiam opinion of this Court, which adopts the dissenting opinion. For the prevailing and dissenting opinions previously entered see 490 F.2d 700 (5th Cir. 1973).

The two issues which are here presented are: (1) is a black plaintiff and an association seeking to represent black employees and prospective employees of some of the departments of the United States Government, who allege, in a section 1981 complaint, egregious acts of discrimination against blacks as a class in employment and promotion in the various government departments, required to exhaust administrative remedies promulgated as regulations by the Civil Service Commission to implement Executive Order No. 11478, as amended by Executive Order No. 11590 [1] as a condition precedent to their

1. This order, in relevant part, reads:
"Section 1. It is the policy of the government of the United States to provide equal opportunity in federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a contin-

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filing either an individual or class action in the United States Courts against United States Government officials who are charged with having been responsible for the acts of discrimination; (2) then, assuming such exhaustion is a prerequisite to the filing of a section 1981 suit, did the conduct of the subordinate officials, acting as Equal Employment counselors, which the plaintiffs claim aborted their efforts to obtain redress through administrative means, satisfy the normal requirements of exhaustion.

When this case was before the original panel the first question was not open for our consideration. This Court had already in the case of Beale v. Blount, 461 F.2d 1133 (5th Cir. 1972) explicitly held that a section 1981 suit could not be brought against the Postmaster General of the United States in a racial discrimination case in federal employment until the plaintiff had exhausted the administrative remedies which we have heretofore referred to. Being bound by that prior decision, as we were, the panel considered merely the second question which is still in issue here. We concluded that what

> uing affirmative program in each executive department and agency . . .
> "Section 2. The head of each executive department and agency shall establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in Section 1. It is the responsibility of each department and agency head, to the maximum extent possible, to provide sufficient resources to administer such a program in a positive and effective manner . . .
> "Section 3. The Civil Service Commission shall provide leadership and guidance to departments and agencies in the conduct of equal employment opportunity programs . . .
> "Section 4. The Civil Service Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment on the basis of race, color, religion, sex, or national origin. Agency systems shall provide access to counselling for employees who feel aggrieved and shall encourage the resolution of employee problems on an informal basis. Procedures for the consideration of complaints shall include at least one impartial review within the executive department or agency and shall provide for appeal to the Civil Service Commission. . . ."

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may be considered to be substantial rebuffs of the plaintiffs in their efforts to have their racial discrimination charges considered by their supervisors, who were also EEO counselors, distinguished this case from Beale v. Blount, *supra*, in that in the latter case the plaintiff was expressly invited to file a complaint with the agency for administrative handling, but he declined to do so, filing the suit in court instead.

Now, however, this Court en banc writes on a clean sheet, it of course being within the competence of the Court sitting en banc to overrule Beale v. Blount, *supra*, if we conclude that it incorrectly states the law in this important area dealing with efforts to put an end to racially discriminatory hiring practices, whether by private employers, state or local governments, or the United States Government itself.

I conclude that the most striking argument for overruling the *Beale* decision is the fact, which none denies, that both the Supreme Court and this Court have repeatedly held that where a case of alleged discrimination on account of race is alleged under section 1983 against a state or under section 1981 against a private employer, or against an individual under section 1982 even though there are administrative means which are intended to give the discriminatee an opportunity to achieve his desired results, the early Civil Rights statutes are available to a plaintiff as an alternative remedy to any others that may exist, and he is not denied access to the courts because of his failure to choose the other way round. Damico et al. v. California et al., 389 U.S. 416, 88 S.Ct. 526, 19 L.Ed.2d 647 (1967) is a case brought under 42 U.S.C.A. § 1983 and it is described in the following manner in the per curiam opinion:

> "Appellants, welfare claimants under California Welfare and Institutions Code §§ 11250, 11254, and regulation C–161.20 thereunder, sought damages, a declaratory judgment of unconstitutionality and temporary and permanent injunctive relief in this suit under the Civil Rights Act, 42 U.S.C. § 1983, 28 U.S.C. § 1343. Their complaint alleges that the

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statute and regulation are discriminatory and that the appellees, in administering them and in applying them to appellants, deprived appellants of equal rights secured by the United States Constitution. The three-judge District Court dismissed the complaint solely because 'it appear[ed] to the Court that all of the plaintiffs [had] failed to exhaust adequate administrative remedies.' This was error. In McNeese v. Board of Education, 373 U.S. 668 [83 S.Ct. 1433, 10 L.Ed.2d 622], noting that one of the purposes underlying the Civil Rights Act was 'to provide a remedy in the federal courts supplementary to any remedy any State might have,' *id.*, at 672 [83 S.Ct. 1433, at 1435] we held that 'relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided [an administrative] remedy,' *id.*, at 671 [83 S.Ct. 1433, at 1435]. See Monroe v. Pape, 365 U.S. 167, 180–183 [81 S.Ct. 473, 480–482, 5 L.Ed.2d 492]. . . ."

So far as relates to suits against private employers this Court, in Sanders v. Dobbs House, 431 F.2d 1097 (5th Cir. 1970) made short shrift of the contention that when Congress passed Title VII of the Civil Rights Act of 1964 this preempted the general remedial language of section 1981, insofar as the right to contract for employment is concerned. In *Sanders* we said:

"Since there is no language in Title VII that can remotely be construed as directly repealing section 1981, the only means of repeal through preemption would be by implication. Repeals by implication, however, are not favored and 'the intention of the legislature must be clear and manifest . . .'" citing cases.

We further stated:

"This interpretation also finds support by analogy in Jones [v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189] where the Court ruled that Title VIII of the Civil Rights Act of 1968 did not repeal § 1982 by implication. Moreover, in Sullivan v. Little Hunting Park, Inc., 396

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U.S. 229, 237, 90 S.Ct. 400, 405, 24 L.Ed.2d 386, 393, . . . the Court stated:

> 'We noted in Jones v. Alfred H. Mayer Co., that the Fair Housing Act of 1968, 82 Stat. 81, in no way impaired the sanction of § 1982. 392 U.S., at 413–417, 88 S.Ct. at 2189–2192. What we said there is adequate to dispose of the suggestion that the Public Accommodations provision of the Civil Rights Act of 1964, 78 Stat. 243, in some way supersedes the provisions of the 1866 Act. For the hierarchy of administrative machinery provided by the 1964 Act is not at war with the principles embodied in § 1982.'"

The case of Caldwell v. National Brewing Co., 443 F.2d 1044, (5th Cir. 1971) even more clearly demonstrates the fact that this Court has made it clear that a plaintiff may file suit on a charge of racial discrimination in employment under section 1981 even where he has deliberately bypassed the EEOC administrative remedies under Title VII. This Court said:

> "We thus are faced with the fact that we have not ruled on the question whether the E.E.O.C. administrative remedies under Title VII of the Act can be deliberately bypassed by a § 1981 plaintiff. The Third Circuit recently considered this question in Young v. International Telephone & Telegraph Co., 3 Cir., 1971, 438 F.2d 757, a case involving facts virtually identical to those in the case at bar. The holding was that nothing in Title VII either expressedly or impliedly imposes any jurisdictional barrier to a suit brought under § 1981. Pointing to the differences in the scope of the remedies afforded under Title VII and § 1981, such as the applicable statutes of limitations and the provision for appointment of counsel and the award of attorney's fees under Title VII (§ 2000e–5(e)(k)), the Third Circuit concluded that appellant has an independent remedy under § 1981 without respect to exhaustion under Title VII. We agree." 443 F.2d 1044, 1046.

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Granting the existence of a 1981 remedy against government officials, which is not drawn in issue by the dissenting opinion, which now becomes the opinion of this Court, it completely escapes my comprehension to understand why the Court should fashion a rule that would give federal officials, acting on behalf of the executive department, preferred status over both private employers, real estate dealers and state governments, by hedging about any suit under the Civil Rights law against federal functionaries by a requirement that the agencies be first given an opportunity to police themselves.

I have referred to the allegations of the complaint as complaining of "egregious acts" of discrimination against blacks by the named defendants. These allegations, which must be taken as true for the purpose of this motion to dismiss, allege, for instance, that in the Department of Defense, in which plaintiff Penn is employed, there are 1,899 G.S. (white collar) Air Force employees in Alabama of which thirty-three or 1.7% are black; 14,000 G.S. Army employees in Alabama of which 235 or 1.7% are black; thirty-five Navy G.S. employees in Alabama of which none is black; forty-eight G.S. Defense Activities employees in Alabama of which none is black; and 366 G.S. Defense Supply Agency employees in Alabama of which fifteen or 4.1% are black. The black population of Alabama is 26.4%. These statistics would seem, under all the standards used by this Court, *e. g.*, Morrow v. Crisler, 491 F.2d 1053 (5th Cir. en banc 1974)[2] to show a strong prima facie case of discrimination.

It is alleged that in the district court case of United States v. Frazier, 317 F.Supp. 1079 (M.D.Ala.1970) the United States had brought a broad suit to seek the end to segregated employment by a wide variety of Alabama State agencies to force equal employment of blacks. It is clear that this was

2. Six blacks out of ninety-one state troopers were hired by Mississippi. The court said: "These figures alone negate the State's argument that its present practices are nondiscriminatory."

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the purpose and effect of the *Frazier* case. It is also alleged that in a recent such suit the Justice Department urged upon the court that it require Alabama State Troopers to hire 25% blacks because Alabama had no black state troopers. *See* Morrow v. Crisler, *supra*, and NAACP v. Allen, 5 Cir., 1974, 493 F.2d 614. It was further alleged that Alabama, with 19,296 merit system employees (equivalent to G.S.), exceeds the federal government in percentage of black employees in G.S. positions.

We cannot but take judicial notice of the fact that the United States Department of Justice which is alleged to have 264 G.S. employees in Alabama and had only eleven, or 4.2%, blacks has pictured itself, and has frequently acted out the part of, being the protagonist of the federal policy to put an end to racial discrimination in all facets of our national life that enjoy constitutional protections. This causes me to share the feeling of the trial court where in a footnote to the opinion the court said:

> "It is, of course, regrettable that, having so vigorously brought and prosecuted actions against various Alabama agencies to insure equal education and employment for blacks, the United States government should now be forced to interpose such a defense as the doctrine of sovereign immunity to a charge of racial discrimination in employment." [350 F.Supp. 754.]

I would express that same feeling to the defense put forward by the government in the nature of its claim that the Civil Rights Act of 1866 may still be used against the state and private individuals but may not run except conditionally against federal officials who are derelict in their duties. I therefore express the deep seated feeling that this Court should not undertake to create a barrier to the filing of a section 1981 suit against federal officials which does not exist in similar actions against either state officials or private individuals.

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It is also difficult for me to understand the concern expressed in the dissenting opinion touching on the "massive" nature of the law suit in light of the complete lack of hesitancy on the part of the United States to undertake as it did in United States v. Frazier, *supra*, to compel the State of Alabama to bring all of its merit system employees into compliance with federal guidelines with respect to discriminatory practices. The government did not move in the trial court to have the court determine whether the case should properly proceed as a class action. If, in fact, the case was too "massive" to be properly handled as a class action there would be no restraints upon the trial court's limiting the action to the class within a single department, the Defense Department, for instance, or even the Air Force, or to limit it to Air Force employees at Maxwell Air Force Base, the site of plaintiff's employment. Clearly no such objection as this is available on a motion to dismiss.

The fact that the NAACP is also a party to the action further emphasizes the impropriety, to my mind, of the decision by this Court to direct the dismissal of the law suit. Under the regulations that existed in 1971, and which were the only ones in effect at the time the suit was filed, it was expressly provided that such an organization could not attack the discriminatory practices *in general* but could only appear on behalf of the named plaintiffs. In light of such limitation, it is inconceivable to me that the Court could hold that there was *any* administrative remedy available for the NAACP as a plaintiff to test out the degree to which the all pervasive discriminatory practices (as alleged) could be alleviated. The amendment to the regulations two weeks *after* the trial court's judgment, could not, it seems to me, warrant a dismissal of the suit which, when filed, was not subject to any objection that the NAACP had failed to exhaust any remedies.

We are not here dealing with a case where a plaintiff relies upon a federal statute as the basis of his right of action

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against federal defendants *when the statute relied upon itself prescribes an administrative remedy.* The doctrine of exhaustion of administrative remedies is discussed in McKart v. United States, 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969), a case in which the doctrine was *not* applied. The Supreme Court quotes with approval the language from Myers v. Bethlehem Ship Building Corp., 303 U.S. 41, 50–51, 58 S.Ct. 459, 463, 82 L.Ed. 638 (1938) as saying:

> "No one is entitled to judicial relief for a supposed or threatened injury until the *prescribed* administrative remedy has been exhausted." (Emphasis added).

Here we are dealing with no "prescribed" remedy.

Such remedy as exists does so simply by virtue of the existence of the Executive Order. It does not, as we have seen, either repeal the basic Civil Rights cause of action nor become an essential part to a plaintiff's reliance on these Civil Rights sections unless, for reasons satisfactory to us, this Court should declare it to be so.

With all the mandatory and cogent language as is present in the executive order and the regulations quoted in the dissenting (now the Court's) opinion having brought about the miserably poor results as we must take here to be true, I am not impressed with the plea that "the agency is denied the benefit of the policy that it be permitted to discover and correct its own errors." One cannot but ask: What, in the name of Justice, has prevented the agency from discovering what must have been apparent to everyone at Maxwell Air Force Base all these years? And what, but a conscious intent not to do so has prevented the proper officials from correcting these crass "errors."

I would excuse any imagined requirement of exhaustion of administrative remedies, if it otherwise existed, on the massive and pervasive violations of the executive order itself. I shall not attempt to elaborate on what was said in the original opinion in the matter of the aborting of the administrative

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remedies because of the clearly pleaded callous disregard, as to Penn's case, and the explicit incorrect response as to Foster, by the persons whose duty it was "to seek a resolution of the matter on an informal basis; to *counsel* the aggrieved person concerning the issues in the matter; to *seek a solution* of the matter on an informal basis," etc., see 713.213 C.F.R.

I conclude only, that if exhaustion is normally required, which I seriously question, then here, there had either been "exhaustion" or such conduct as would require us to find it to be excused—not to "penalize" the EEO counselors for bad performance as suggested by the opinion, but to save a law suit showing on its face so much merit, after all of this time has passed. I am loath to say to Mr. Penn, after his 22 years employment at not exceeding a G.S. Grade 5 and Navy veteran Foster,[3] after his fifteen years of employment at no better than a G.S. Grade 4 that they have no right to maintain this section 1981 suit that has now been pending for two and a half years. In light of the alleged treatment given them I cannot tell them that they are remanded to the system that has, according to the facts alleged, treated them with such callous rejection.[4]

I would affirm the order of the trial court.

3. Foster alleged that while serving in the Procurement Office at Maxwell Air Force Base he received a certificate in accounting from Floyd Commercial Business School.

4. Of course, I refer only to what is alleged, but by making its motion to dismiss, the government has elected to say "If everything you allege is true, you cannot sue."

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3684

WILLIE PENN, Individually, Etc., ET AL,
Plaintiffs-Appellees,

versus

JAMES R. SCHLESINGER,
Individually and as Secretary of Defense, Etc., ET AL,
Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Alabama

(December 18, 1973)

Before TUTTLE, GODBOLD and MORGAN, Circuit Judges.

TUTTLE, Circuit Judge: This interlocutory appeal pursuant to 28 U.S.C. §1292(b)[1] raises three questions:

[1] "When a district judge, . . . shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order . . ."

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(1) Whether racial discrimination in hiring and promotion by federal agencies is actionable by discriminatees; (2) Whether such claims of discrimination are barred by sovereign immunity; and (3) Whether these plaintiffs exhausted available administrative remedies before filing suit in federal court.

Plaintiffs-appellees Willie Penn, Charles Foster, and the Alabama State Conference of the NAACP, on behalf of themselves, the organization's membership, and "all blacks in Alabama similarly situated" brought this action against the United States and the individuals heading seventeen federal agencies employing persons in Alabama.[2] Plaintiffs Penn and Foster, both civilian employees of the Department of Defense at Maxwell Air Force Base in Alabama allege they have been denied promotions or advancement solely because of their race. The district court held that the plaintiffs had stated a claim upon which relief could be granted, that sovereign immunity barred relief against the United States but not against the individual government officials, and that the plaintiffs had sufficiently exhausted their administrative remedies before filing this suit. The court, while permitting discovery to proceed, allowed the defendants to make an interlocutory appeal on the controlling questions of law involved in the suit. We affirm.

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[2]The agency heads being sued are the Secretaries of the Departments of Defense, Treasury, Interior, Agriculture, Commerce, Labor, Health, Education and Welfare, Housing and Urban Development, Transportation, The Attorney General, The Postmaster General, The Directors of the General Services Administration and The Selective Service System, The Comptroller General, and The Chairman of the Railroad Retirement Board and The National Aeronautics and Space Administration.

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I. CAUSE OF ACTION.

Assuming for purposes of this interlocutory appeal that the plaintiffs have defined a proper class under Rule 23 and that they were discriminated against by some seventeen federal agencies having offices in Alabama,[3] the question remains whether the plaintiffs have stated a claim upon which relief can be granted.

The parties are agreed that Title VII of the Civil Rights Act of 1964 is inapposite.[4] First, the plaintiffs claim that Executive Order No. 11478, as amended by Executive Order No. 11590,[5] creates a cause of action

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[3]Neither of these questions has yet been litigated.

[4]Though Title VII proscribes unlawful employment practices including racially discriminatory hiring and promotion, the federal government is not included within the definition of "employer" under the Act. 42 U.S.C. §2000e(b).

[5]This order, in relevant part, reads:

> "Section 1. It is the policy of the government of the United States to provide equal opportunity in federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency . . .
>
> "Section 2. The head of each executive department and agency shall establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in Section 1. It is the responsibility of each department and agency head, to the maximum extent possible, to provide sufficient resources to administer such a program in a positive and affective manner . . .
>
> "Section 3. The Civil Service Commission shall provide leadership and guidance to departments and

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by discriminatees against the federal government. Second, plaintiffs allege that 42 U.S.C. §1981[6] enables them to sue the federal government for infringement of their right to make and enforce employment contracts on equal grounds with white citizens. Third, they contend that the Fifth Amendment of the United States Constitution creates a direct cause of action by discriminatees against the federal government.[7]

Since, as will subsequently appear, we hold the opinion that the complaint states a claim upon which relief can be granted under Section 1981, we pretermit the

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agencies in the conduct of equal employment opportunity programs . . .

"Section 4. The Civil Service Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in federal employment on the basis of race, color, religion, sex, or national origin. Agency systems shall provide access to counselling for employees who feel aggrieved and shall encourage the resolution of employee problems on an informal basis. Procedures for the consideration of complaints shall include at least one impartial review within the executive department or agency and shall provide for appeal to the Civil Service Commission . . ."

[6] "All persons within the jurisdiction of the United States shall have the *same right* in every state and territory *to make and enforce contracts*, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property *as is enjoyed by white citizens*, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." (Emphasis added).

[7] The due process clause of the Fifth Amendment restricts the federal government in some areas which would be covered by the equal protection clause of the Fourteenth Amendment if applied to a state. See, e.g. *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding racial segregation violates due process).

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questions whether this claim might also be cognizable under either the Executive Order or the Fifth Amendment.[8]

Our decision in *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097 (1970), held that Section 1981 provided a cause of action to a black employee allegedly discharged solely because of her race. Thus, this Section creates a cause of action for employment contract discrimination against private employers. Though no decision directly in point has been brought to our attention, we think it clear that the rationale of the *Dobbs House* decision applies to employment discrimination by federal officials as well as by private employers.

In *District of Columbia v. Carter*, 409 U.S. 418 (1973), the Supreme Court said that Section 1982[9] is "an 'absolute' bar to *all* such discrimination, private as well as public, federal as well as state." 409 U.S. at 422. The Court held that Section 1982 was intended to prohibit particular types of discrimination regardless of

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[8]Another Executive Order, which we held did not create such a cause of action, is similar to, albeit distinguishable from, Executive Order No. 11478, See *Farkus v. Texas Instruments, Inc.*, 375 F.2d 629 (5th Cir. 1967).

Though the constitutional claim of racially discriminatory employment practices appears to be closely analogous to the claim of the plaintiffs in *Bolling v. Sharpe, supra*, the existence of a statutory cause of action under Section 1981 renders it unnecessary for us to decide whether such private actions as this one are necessary to insure compliance with the due process clause by the federal government. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 at 398 (1971) (concurring opinion by Mr. Justice Harlan.)

[9]Like Section 1981, Section 1982 was part of the Civil Rights Act of 1866, enacted pursuant to Congress's power under the Thirteenth Amendment.

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their sources. In this respect, Section 1982 was contrasted with Section 1983. While the former was enacted to implement the principles enunciated in the Thirteenth Amendment, the latter legislation, enacted eleven years later, was based upon the Fourteenth Amendment. While Section 1982 prohibited discriminatory activity from whatever source, Section 1983 was directed only at discriminatory activities of the states.

The narrow question in this case is whether Section 1981 is more closely analogous to Section 1982 or to Section 1983. In our view, there is no doubt but that Section 1981, like its sister Section, 1982, provides a cause of action against *all* discrimination against blacks, because of race or color, in the making and enforcement of contracts. Therefore, the allegation that the federal government has violated the plaintiffs' contract rights on account of their race does state a cause of action under Section 1981 of the Civil Rights Act of 1866. Hence, we turn to the question whether sovereign immunity bars recovery against the federal government and its employees when an action is brought under Section 1981.

II. SOVEREIGN IMMUNITY.

In the first place, we agree with the district court's analysis that Section 1981 does not constitute a waiver of sovereign immunity by the federal government. It is well settled that a waiver of sovereign immunity must be specific and explicit; such a waiver cannot be implied by construction of an ambiguous statute. See *United States v. Shaw*, 309 U.S. 495 (1940); *Barc-*

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field v. Byrd, 320 F.2d 455 (5th Cir. 1963), cert. denied 376 U.S. 928 (1964). Since Section 1981 contains no explicit waiver of sovereign immunity by the federal government but merely a general prohibition of discrimination on racial grounds, it does not constitute a waiver of this immunity. Any doubt concerning disposition of this issue was put to rest in our decision of *Beale v. Blount*, 461 F.2d 1133 (5th Cir. 1972), which held a Section 1981 suit for injunctive relief against the federal government to be barred by the doctrine of sovereign immunity.

While the plaintiffs concede and the district court held that *Beale v. Blount* bars this suit as against the government itself, the plaintiffs present two arguments which they contend circumvent the sovereign immunity bar with respect to the individual federal officials. First, they argue that the Fifth Circuit cases of *Beale v. Blount* and *Blaze v. Moon*, 440 F.2d 1348 (5th Cir. 1971) constituted improper extensions of the Eighth Circuit case of *Gnotta v. United States*, 315 F.2d 1271 (8th Cir. 1969), cert. denied, 397 U.S. 934 (1970). While it is true that *Gnotta* involved review of an administrative finding that no discrimination had been proven while *Blaze* and *Beale* were cases in which discrimination had been admitted, we are bound by precedent in this circuit to accept the extension of *Gnotta* to cases of admitted discrimination. Second, the plaintiffs contend that *Blaze* and *Beale* must be read in light of two Supreme Court decisions which recognize certain exceptions to the doctrine of sovereign immunity in suits against federal officials. *Larson v. Domestic and Foreign Commerce Corporation*, 337 U.S. 682

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(1949) and *Dugan v. Rank*, 372 U.S. 609 (1963). Chief Justice Vinson stated these exceptions to sovereign immunity as follows:

> "There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign . . . [First,] where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief . . . a second type of case is that in which the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional . . . . here, too, the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign." 337 U.S. 689-90.

In our opinion, a violation of Section 1981 by a federal official must be deemed an *ultra vires* action on the official's part. Since this federal statute specifically prohibits racial discrimination in the making and enforcement of employment contracts, we cannot infer that federal officials responsible for making employment contract decisions are acting within the scope of their duties on behalf of the sovereign when they act in a racially discriminatory manner.

However, since *Beale v. Blount* held further that injunctive relief against allegedly racially discriminatory practices by individual federal officials in the Post Office Department was barred by the doctrine of sovereign immunity, we must examine in greater detail the relief requested by the plaintiffs in order to ascertain what relief would, if granted, run against the sovereign rather than merely against an officer of the sovereign acting *ultra vires*.

The plaintiffs did not seek to enjoin these officials from violating Section 1981. However they did seek "a declaration that the defendants have engaged in a practice of denial of equal right to contract with blacks in Alabama in employment and that such practice is a violation of Title 42 U.S.C. §1981." Further, they requested that defendants institute a practice of hiring one black for every one white hired until the ratio of blacks in defendants' federal jobs in Alabama is approximately in proportion to the percentage of blacks in Alabama's population.

With respect to the individual named plaintiffs, Willie Penn sought to require that his rating be increased to G.S. 11 and that he be promoted into the next available position in base procurement for which he is qualified; a further order was sought requiring the Department of Defense to pay him a sum of money, including interest, to represent the salary Penn would have received had he been promoted without regard to race. Plaintiff Foster requested an order requiring the Department of Defense to increase his rating to no less than G.S. 5 and promotion into the next available posi-

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tion in procurement or elsewhere for which he is qualified, an order requiring back pay for wages he would have earned had he been promoted without regard to race, and an award of damages for humiliation and embarrassment suffered as a result of racially discriminatory practices.[10]

In *Beale v. Blount*, this court drew a distinction between a claim for injunctive relief and a claim for reinstatement, holding the former barred by the doctrine of sovereign immunity. The latter, being in the nature of a mandamus action, bypassed this obstacle. 461 F.2d at 1137-38. A declaratory judgment, if equivalent to a claim for injunctive relief would be similarly barred by the doctrine of sovereign immunity. Under other circumstances, it might be more analogous to a mandamus action. On this interlocutory appeal, with no declaratory order before us, we cannot of course prejudge which classification might be appropriate.

The remainder of the relief requested, save the claims for back wages and for damages, both of which would impinge upon the Treasury, are in the nature of mandamus actions. Thus, upon remand, it is within the power of the court (1) to order promotion of the plaintiffs if appropriate and (2) to institute affirmative remedies on behalf of the class if such remedies are

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[10]Plaintiff Penn's motion for a preliminary injunction against the director of the Procurement Section to prevent her from "intimidating, harassing and threatening plaintiff Willie Penn or any class plaintiff as a result of plaintiff Penn filing his law suit" has not been pressed upon this appeal. We therefore decline to discuss this remedy further.

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necessary to overcome *ultra vires* discrimination by the individual defendants.

III. EXHAUSTION OF REMEDIES.

Since sovereign immunity does not present a bar to all the relief requested by plaintiffs, we must now turn to the question of whether the plaintiffs sufficiently exhausted available administrative remedies before filing this suit.

Before petitioning to the district court, Penn had repeatedly made known his desire for advancement to his white supervisor. This supervisor failed to inform Penn of his right to file a complaint with an Equal Employment Opportunity Officer. Therefore, Penn did not enter into the latter stages of the Equal Employment Opportunity Commission and Civil Service Commission processes for handling racial discrimination grievances. Plaintiff Foster had likewise complained about his lack of advancement to his white supervisors. One of these, who was also an Equal Employment Opportunity Counselor, had discouraged Foster from prosecuting his complaints administratively. This supervisor had advised him "that he would have to file a suit if he expected to carry his complaint further." We must decide whether these actions taken by Penn and Foster, in light of the responses they received from their supervisors, constituted exhaustion of their administrative remedies.

It has been decided by this Court that one seeking relief in the federal courts from actions taken by fed-

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eral administrative agencies must first exhaust the administrative remedies available to him.[11] However, as the Supreme Court pointed out in *McKart v. United States*, 395 U.S. 185 (1969), exhaustion of administrative remedies is not a matter of black letter law. The Court there said:

> "The exhaustion doctrine is applied in a number of different situations and is, like most judicial doctrines, subject to numerous exceptions. Application of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved." *Id.* at 193.

In 1971, when Penn and Foster filed this suit,[12] the scheme for filing complaints was set out in 5 C.F.R. Part 713. Under Section 713.213(a), an aggrieved employee first had to approach a designated EEO Counselor within his agency or branch. This counselor, who was authorized to attempt to settle the grievance informally, was required to advise the employee of his right to file a more formal complaint with the EEO Officer should

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[11]In *Beale v. Blount, supra*, the Court drew a distinction between federal court actions against *federal* officials and federal court action against a state agency or official. This distinction, having been drawn, is binding on us. We cannot accept appellant's argument, therefore, that we equate the present suit with one in which a Section 1981 plaintiff may deliberately by-pass administrative remedies under Title VII of the Civil Rights Act. *See Caldwell v. National Brewing Company*, 443 F.2d 1044 (5th Cir. 1971).

[12]The 1972 Amendments to the Economic Opportunity Act are irrelevant to disposition of the claims herein.

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the informal attempt fail. The filing of a formal complaint under Section 713.214 triggered an investigation by the agency's Director of Equal Employment Opportunity (5 C.F.R. §713.216). After completion of this investigation and review of the investigative file by the complainant, the agency was required to further provide another opportunity for informal resolution of the complaint (5 C.F.R. §713.217(a)). If this, too, was unsuccessful, the complainant had to be notified in writing of the agency's proposed disposition of the complaint and advised of his right to a full evidentiary hearing before an impartial appeals examiner (5 C.F.R. §713.217(b)). If a hearing was held, 5 C.F.R. §713.218, the appeals examiner was required to make findings and analyses of "the matter which gave rise to the complaint and the general environment out of which the complaint arose" and render a recommended decision on the merits of the complaint, "including remedial action, where appropriate." 5 C.F.R. §713.218(g).

The agency head or his delegate then received these findings and recommended decision, and made a decision for the agency on the information in the complaint file. 5 C.F.R. §713.221(a). If the agency head either rejected or modified the recommended decision, the reasons for that action had to be set forth. 5 C.F.R. §713.221(b)(2). At this point, the agency head could require "any remedial action authorized by law determined to be necessary or desirable to resolve the issues of discrimination and to promote the policy of equal opportunity." 5 C.F.R. §713.221(c). This decision had to be transmitted in writing to the com-

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plainant, together with copies of the hearing record and the appeals examiner's findings and recommended decision, and it had to inform him of his right to appeal to the Civil Service Commission. 5 C.F.R. §713.221(b) and (d).

After review by the Civil Service Commission, all the possible administrative remedies which the plaintiffs might have pursued would have been terminated. There is no question but that at this point, suit in federal court alleging that discrimination had occurred and no remedy had been afforded would have been proper.

If the plaintiffs had deliberately bypassed their administrative remedies, this suit would clearly be inappropriate. In *Beale v. Blount, supra.*, the plaintiffs had been invited by postal authorities to file a formal claim of racial discrimination. *Beale* failed to do so and argued that presentation of this claim was unnecessary. This court held to the contrary, dismissed the suit for failure to exhaust administrative remedies, and declared:

> "We adhere to the time-tested requirement that available administrative remedies be exhausted prior to the institution of a mandamus action. The federal bureaucracy's efforts to police its own practices with respect to discrimination in employment on the basis of race should not be undermined. This would be the predictable effect of sanctioning resort to the federal courts before completion of the administrative review process." 461 F.2d at 1139.

This suit, however, is substantially different from that of *Beale v. Blount*. Here, rather than deliberately bypassing their administrative remedies, the plaintiffs approached the administrative officials charged at the first level with responsibility for processing these complaints. The question before us is whether the plaintiffs need have done more before filing suit in federal court.

The defendants contend that further exhaustion would allow the Civil Service Commission to exercise its authority to rectify discriminatory employment practices. They argue further that requiring no more exhaustion than was present here would hamper the achievement of uniformity in the resolution of complaints of discrimination. Finally, they contend that allowing the suit constitutes an uneconomical use of judicial time.

There is little merit to these arguments. First, it was the fault of the agency officials, not the plaintiffs, that the Civil Service Commission was given no opportunity to pass upon the complaints. Second, no disuniformity is created by a rule which says that exhaustion is completed at the point where agency personnel refused to further process grievances and pass them on to the next link in the chain of command. Third, judicial time is not needlessly wasted for our interpretation of the exhaustion requirement here should help insure that, in the future, federal agencies process such complaints in accordance with their own procedures rather than short-circuiting them into federal court.

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For the reasons stated above, the order of the district court granting the United States' motion to dismiss and denying the individual defendants' motion to dismiss is AFFIRMED and the case REMANDED for further proceedings not inconsistent with this opinion.

MORGAN, Circuit Judge, specially concurring:

Although I agree fully with the reasoning and results of the majority opinion in this case, a few words about the issue of exhaustion may be helpful. Judge Tuttle correctly states that in light of our conclusion that the plaintiffs exhausted all available administrative remedies, it is unnecessary to decide whether exhaustion was required. Nevertheless, it seems clear from existing precedent that in an action under the Civil Rights Act of 1866, 42 U.S.C. § 1981 *et seq.*, exhaustion of administrative remedies is not required.

The question may have remained open after *McNeese* v. *Board of Ed.*, 373 U.S. 668 (1963), since the court held there that resort to the state administrative remedies may well have been futile. However, the more recent decision of *Damico* v. *U.S.*, 389 U.S. 416 (1967), seems to have settled the question, at least for the time being. Both of these decisions related to the failure to exhaust state administrative remedies, while in this case we have a question of resort to federal administrative remedies. However, the policies behind the requirement of exhaustion of state administrative remedies are even stronger than those requiring exhaustion of federal administrative remedies, because of comity considerations. Thus, if state exhaus-

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tion is not required, *a fortiori,* exhaustion of federal remedies should not be required.

It is true that *McKart* v. *U.S.*, 395 U.S. 185 (1969), while holding that a failure to exhaust remedies within the Selective Service System did not preclude raising certain defenses in a criminal prosecution for failure to report for induction, included strong language in support of the exhaustion requirement. However, that case cannot possibly be held to have overruled *Damico.* Therefore, although the wisdom of this exception to the exhaustion requirement has been questioned,[1] we are apparently left with a flat exemption to the requirement of exhaustion in civil rights cases. But see, *Eisen* v. *Eastman,* 421 F.2d 560 (2 Cir. 1969).

Although this circuit has followed this rule in some cases, *Caldwell* v. *National Brewing Company,* 443 F.2d 1044 (5 Cir. 1971), it has not always done so. *Beale* v. *Blount,* 461 F.2d 1133 (5 Cir. 1972). It is this unfortunate inconsistency which creates confusion among the judiciary and the bar. Although this was not the case in which to do so, we should take the earliest opportunity to rationalize and make consistent this confusing area of the law.

GODBOLD, Circuit Judge, dissenting:

This is not run of the mill litigation but potentially a massive case. In my view the allegations of plaintiffs concerning their reasons for failing to utilize their administrative remedies are not a sufficient basis for

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[1] K. Davis, *Administrative Laws Treatise,* 1970 Supp., §20.01.

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transferring this inquiry out of the carefully structured grievance system provided by the United States government and into the federal courtroom.

The suit is a class action directed at the employment practices of 17 agencies of the United States operating in the State of Alabama. Named as defendants were the United States and the individual heading each agency (and his successor), including 10 cabinet officers of the United States government plus a substantial array of other government officials. The agencies, the individual defendants, and the number of Alabama employees of each agency are:

Department of Defense and
Melvin R. Laird: 16,348 employees

Treasury Department and
John B. Connally: 689 employees

Department of Justice and
Richard Kleindienst: 264 employees

Department of the Interior and
Rogers C. B. Morton: 170 employees

Department of Agriculture and
Earl Butz: 1200 employees

Department of Commerce and
Maurice Stans: 128 employees

Department of Labor and
James D. Hodgson: 5 employees

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Department of Health, Education
and Welfare and Elliot L. Richardson:
2,161 employees

Department of Housing and Urban
Development and George Romney:
182 employees

Department of Transportation and
John A. Volpe: 414 employees

U.S. Postal Service and
Elmer T. Klassen: 901
rural mail carriers, 167
Fourth Class postmasters
and 7,329 employees

General Services Administration and
Robert L. Kunzig: 46 employees

General Accounting Office and
Elmer B. Staats: 12 employees

NASA and Dr. James C. Fletcher:
5,454 employees

Railroad Retirement Board and
Howard W. Habermayer: 10 employees

Small Business Administration and
Thomas S. Kleppe: 37 employees

Selective Service System and
Dr. Curtis W. Tarr: 17 employees

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Only the individual government officers remain in the case as defendants, since the United States was ordered dismissed on the ground of sovereign immunity and no cross-appeal was taken from that order. The case was certified to us for interlocutory appeal under 28 USC §1292(b). The District Court has not ruled on the class action feature, but if plaintiffs are permitted to represent the class they have staked out they will be entitled to pervasively investigate and litigate the employment practices of a wide spectrum of agencies with thousands of employees.

In addition to alleging a prima facie statistical case of discrimination, the complaint states that the listed agencies have engaged in a broad range of discriminatory practices, including the following: failure to recruit blacks; use of nonvalidated employment and advancement tests; oral selection interviews; employment of persons without employment tests and without adequate guidelines to insure nondiscriminatory hiring or with adequate guidelines that are arbitrarily disregarded; arbitrary selection of white persons over equally qualified blacks; promotions of less qualified whites or whites with less seniority than blacks; discrimination and denial of the right to equal contract in employment based solely on race.

The judicial remedies sought are far-reaching: (1) a declaration that defendants have (a) systematically and unconstitutionally discriminated against blacks in employment on racial grounds, (b) violated Executive Order 11478 relating to equal employment opportunity in the federal government, and (c) denied to blacks

the right to contract regarding their employment; (2) an order in the nature of mandamus compelling defendants to perform their duties under Executive Order 11478; (3) establishment of a one-to-one hiring ratio in the 17 named agencies in Alabama until the percentage of black employees is approximately the percentage of blacks in Alabama's population; and (4) promotions and back pay for the individual plaintiffs.

The narrow fulcrum employed to lever this plenary inquiry out of institutional channels and into the federal court system consists of vague and unverified allegations by two individuals employed by a single federal agency (and at one location) concerning informal remarks alleged to have been made to them by two (or three) other government employees designated as EEO "counselors" or "officers." Seldom was so small a camel's nose employed to drag so large a camel into the tent.

In the original complaint the plaintiffs were the NAACP and Penn. Penn charged that he had been employed as a GS-1 and after 20 years had been promoted to only GS-5, when in fact his experience, ability, training, seniority and job knowledge entitled him to a rating of GS-10 or 11, and that failure of his white superiors to promote him was based solely upon his race. As to exhaustion, Penn originally alleged only this:

> Mr. Penn let his supervisor know that he was desirous of receiving a promotion to any better paying [job] or to one that carried more responsibility. Mr. Penn put his superiors on notice of his desire of advancement.

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The government filed a motion to dismiss asserting failure to exhaust, and by an amended complaint this language was added regarding Penn:

> The supervisor to whom Plaintiff Penn made complaints and made known his desire to fill any better paying or more responsible position was Ruth Hunter. ... In addition to Mrs. Hunter's position as head of Procurement, she is also the alternate Chief Counselor for Equal Employment Opportunity at MAFB. Mrs. Hunter never informed Plaintiff Penn of his right to file a complaint with an E. E. O. officer. Under 5 CFR 713.213(a) it was Mrs. Hunter's legal duty to advise Plaintiff of his right to file such complaints.

The amended complaint also added Foster as a plaintiff and class representative. He alleged various unsuccessful efforts to seek better employment at Maxwell Air Force Base, and then as to exhaustion alleged:

> Plaintiff Foster then called a Mr. Glenn, Chief Counselor for Equal Employment Opportunity at MAFB. Glenn referred Mr. Foster to A. C. Carter, Equal Employment Opportunity Officer, a white man. Plaintiff had a meeting with Mr. Carter in which he asked Carter to check the eligibility roster (promotion register) to determine where his (Foster's) name was in relation to the two ladies who had been promoted. Carter would not give Foster that information, and during the course of the con-

versation indicated to Mr. Foster that he would have to file a suit if he expected to carry his complaint further. Carter and Glenn did not inform Foster of any other remedies available to him.

In its order on motion to dismiss the District Court noted the basic principle that available administrative remedies must be exhausted before a court will decide a constitutional question, and referred to *Beale v. Blount*, 461 F.2d 1133 (CA5, 1973), in which this court affirmed the dismissal of a discharged federal employee's complaint for failure to exhaust. The court, however, distinguished *Beale* on the ground that the plaintiff therein made no attempt to exhaust his administrative remedies and did not allege that resort to administrative processes would be a meaningless ritual, but merely claimed that he did not need to present his claim administratively before bringing suit, while the instant plaintiffs alleged that they had attempted to exhaust "only to be thwarted in the initial stages of those proceedings by federal officials charged with the duty of hearing complaints of racial discrimination and informing plaintiffs of additional channels of appeal." Characterizing their actions as "abortive attempts to exhaust" and accepting all allegations as true, the District Court concluded that Penn's and Foster's failure to go farther in the administrative processes was solely due to the breaches of duty expressly imposed on other governmental employees [presumably Mrs. Hunter and Glenn, EEO counselors, and Carter, an EEO officer].

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The amended allegations as to Penn charged no more than that Mrs. Hunter failed to inform him of his right to file a complaint. The allegations as to Foster are twofold — that Glenn and Carter failed to inform him of his right to file a complaint and that Carter "indicated" to him that he would have to file suit if he expected to go farther.

The exhaustion requirement is fully discussed in *McKart v. U.S.*, 395 U.S. 185, 23 L.Ed.2d 194 (1969), which points out that "[a]pplication of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved." *Id.* at 193, 23 L.Ed.2d at 203. *McKart* refers to these purposes, among others: (1) avoiding premature interruption of the administrative process, in recognition that it is desirable that the agency develop a record and have the opportunity to exercise its discretion and apply its expertise; (2) recognizing that the exhaustion doctrine is an "expression of executive and administrative autonomy" and that the courts should not interfere with the agency until it has completed its action or exceeded its jurisdiction; (3) practical notions of judicial efficiency, since the complaining party may vindicate his rights administratively and the courts may never have to intervene; (4) permitting an administrative agency to discover and correct its own errors; (5) avoiding the flouting of the administrative process that can weaken the agency's effectiveness by encouraging people to ignore its procedures.

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When one scrutinizes the specific administrative system here involved in the light of the foregoing policies, as *McKart* instructs judges to do, it becomes apparent that the issue of the possibly discriminatory hiring practices of these numerous agencies in an entire state cries out for nonjudicial handling.

Pursuant to the sweeping mandate of Executive Order 11478,[1] the Civil Service Commission promulgated

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[1]The Order, which was buttressed by the Equal Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 111, 42 U.S.C. § 2000e-16 (1970), declares that the policy of equal opportunity is to be promoted "through a continuing affirmative program in each executive department and agency" and "must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees in the Federal Government." The order provides that "[t]he head of each executive department and agency shall establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction * * *." In this regard, the order specifies that the responsibilities of executive department and agency heads include, *e.g.*, provision of sufficient resources to administer the program "in a positive and effective manner", recruitment which reaches "all sources of job candidates", full utilization of the present skills of each employee, provision of "the maximum feasible opportunity to employees to enhance their skills so they may perform at their highest potential and advance in accordance with their abilities", and provision of training and advice to supervisors to assure their understanding and implementation of this equal employment opportunity policy. The order directs that the Civil Service Commission shall, *e.g.*, provide leadership and guidance to departments and agencies in the conduct of equal employment opportunity programs, review and evaluate agency program operations periodically, and issue such regulations, orders and instructions at it deems necessary and appropriate to carry out the Executive Order. And with respect to complaints alleging discrimination, the order directs that:

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comprehensive regulations that are particularly well calculated to ensure ready reception and prompt, fair disposition of discrimination claims.

Under the procedural provisions of the regulations,[2] an agency must first seek to resolve a charge of discrimination promptly through consultation between the aggrieved person and an Equal Employment Opportunity counselor. 5 C.F.R. § 713.213. If this is unsuccessful, the aggrieved person may file a formal complaint, *id.* § 713.214, which triggers an investigation by the agency's Director of Equal Employment Opportunity, *id.* § 713.216. Upon the completion of this investigative file, the agency must provide another opportunity for informal resolution of the complaint, *id.* § 713.217(a).

"The Civil Service Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment on the basis of race, color, religion, sex, or national origin. Agency systems shall provide access to counseling for employees who feel aggrieved and shall encourage the resolution of employee problems on an informal basis. Procedures for the consideration of complaints shall include at least one impartial review within the executive department or agency and shall provide for appeal to the Civil Service Commission."

The Civil Service Commission has promulgated Equal Opportunity Regulations which implement all of the directives of Executive Order 11478, as amended (5 C.F.R. Part 713 (1972 rev.)). These regulations specify in detail the procedures which each department or agency shall follow in processing and resolving individual complaints of discrimination.

[2]The regulations in force at the inception of this suit were promulgated in 1971, and were superceded in 1972. Note 3, *infra*, discusses certain of the changes made by the 1972 version.

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If attempts at informal resolution fail again, the complainant must be notified in writing of the agency's proposed disposition of the complaint and advised of his right to a full evidentiary hearing before an impartial appeals examiner, *id.* § 713.217(b). If a hearing is held, *see id.* § 713.218, and appeals examiner must thereafter make findings and analyses of "the matter which gave rise to the complaint and the general environment out of which the complaint arose" and render a recommended decision on the merits of the complaint, "including remedial action, where appropriate, with regard to the matter . . . and general environment out of which the complaint arose." *Id.* § 713.218(g). These findings and recommended decision must be transmitted to the agency head or his designee, who then makes the decision of the agency on the information in the complaint file. *Id.* § 713.221(a). If the agency either rejects or modifies the recommended decision, as opposed to adopting it, the reasons for that rejection or modification must be set forth. *Id.* § 713.221(b)(2). The agency "shall require any remedial action authorized by law determined to be necessary or desirable to resolve the issues of discrimination and to promote the policy of equal opportunity." *Id.* § 713.221(c). The agency decision must be transmitted in writing to the complainant, together with copies of the hearing record and the appeals examiner's findings and recommended decision, and the decision must also inform the complainant of his right to appeal to the Civil Service Commission. *Id.* § 713.221(b) and (d).

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Upon an appeal to the Commission, the 1971 regulations provide for a review by the Board of Appeals and Review, without a hearing, of the complaint file and all relevant written representations made to the Board. *Id.* § 713.234. The Board, which may remand a complaint to the agency for further investigation or rehearing, must issue a written decision setting forth the reasons for its conclusions. *Id.* § 713.234. Copies of the Board's decision must be sent to the complainant, his representative, and the agency, and when corrective action is ordered, the agency "shall report promptly to the board that the corrective action has been taken." *Id.* § 713.234. The Board's decision is final, but the Commissioners, upon request, may reopen the decision for consideration of new and material evidence, if the decision involves an erroneous interpretation of law or regulation or a misapplication of established policy, or if the decision is of an exceptional nature. *Id.* § 713.235.[3]

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[3]In October 1972, a few days after the District Court had entered its order, the Equal Opportunity Regulations were revised by the Civil Service Commission (see 37 Fed. Reg. 22717, October 21, 1972). As a result of this revision, the regulations now additionally require that an agency resolve a complaint within 180 calendar days after it is filed, including the time spent in conducting an evidentiary hearing. 5 C.F.R. § 713.220. The regulations now specify the relief which an agency must offer employees and applicants for employment against whom the agency is found to have discriminated, including, for example, retroactive promotion with back pay and retroactive appointment to the position previously denied with back pay. *Id.* § 713.271.

The earlier regulations permitted an organization acting in an aggrieved person's behalf to file and prosecute his claim but not to raise general allegations of discrimination unrelated to the individual complaint. The amended regulations broaden this right, providing for filing with an agency of

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In my view the *McKart* policies are disserved by permitting these plaintiffs to skip all the administrative procedural steps that begin with the filing of a written complaint. In the beginning it is to be noted that plaintiffs do not claim that the administrative system is insufficient, see *NLRB v. Shipbuilding Local 22*, 391 U.S. 418, 20 L.Ed.2d 706 (1968), or that resort to it will be futile. *Ogletree v. McNamara*, 449 F.2d 93 (CA6, 1971). There has been no opportunity for a record to be developed at the agency level. The agency appeal bodies and the Civil Service Commission, which handles these matters nationwide, will have no opportunity to exercise discretion and expertise.

Moreover, the agency is denied the benefit of the policy that it be permitted to discover and correct its own errors. The majority refers to this consideration but declines to give it weight on the ground that it was the fault of the agency and not plaintiffs that the agency had no opportunity to pass on plaintiffs' complaints. But the policy favoring self correction applies at least as forcefully to procedural slipups as to erroneous agency decisions on the merits of discrimination claims.

"general allegations by organizations or other third parties of discrimination in personnel matters within the agency which are unrelated to an individual complaint." *Id.* § 713.251. Any such allegation shall be stated with sufficient specificity so that the agency may conduct an investigation, and the agency "shall notify the party submitting the allegation of its decision, including any corrective action taken on the general allegations." The third party may appeal the agency decision to the Commission, which "shall issue a decision on the allegation ordering such corrective action, with or without back pay, as it deems appropriate." *Id.*

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The majority opinion, as I read it, intimates that excusing plaintiffs from exhausting is appropriate as a means of penalizing or rebuking erring administrators and impelling them to do better next time.[4] With deference, it seems to me that this misconceives the policies undergirding exhaustion. The sound reason for lowering the barrier is not to teach the agency a lesson but to ensure that when a complaining employee faces a genuinely futile administrative effort, he will be allowed directly into court.

This brings us to the question of the waste of judicial tools which this case entails. When the District Court ruled, the plaintiffs' right to an administrative remedy was still viable, and it remains viable at this time. See 5 C.F.R. § 713.213(a). Under the 1972 Regulations, now in effect, the complaint must be acted upon by the agency within 180 days from filing. We are now, more than a year after the District Judge denied the motion to dismiss, and pursuant to an appeal certified to us by the District Judge, striving at the appellate level to reach decision on the threshold question of whether plaintiffs should be in federal court at all. Although the majority says they should, all may still be in vain, since at this juncture there has been no determination whether in the informal conferences the supervisory personnel at Maxwell Air Force Base ac-

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[4]The majority refers to agency personnel's "refusing to further process grievances and pass them on to the next link in the chain of command." This seems to me a somewhat exaggerated characterization of what plaintiffs contend. (The relevant portions of the complaint are quoted in the early part of this opinion.)

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tually said, or failed to say, what Plaintiffs allege. Additionally, of course, the judicial time and manpower already expended will be but the tip of an iceberg once the broad investigation which the majority would permit actually occurs.[5]

To this point I have addressed myself to broad policies that relate to the requirement of exhaustion. There are other and more narrow reasons why plaintiffs should not be excused from exhausting. The material in the complaint bearing on plaintiffs' informal contacts with Maxwell personnel designated as EEO officials was added by amendment after exhaustion surfaced as an issue and in an effort to allege frustration. But neither plaintiff has alleged that he lacked actual knowledge of his right to file a formal administrative complaint, or that his failure to proceed further in administrative channels was in fact caused by the remarks made to him. I can find nothing in the amended complaint to support the District Court's conclusion that plaintiffs' failure to go farther was solely due to the misbehavior of others. Rather, the pleadings do not exclude the possibility that plaintiffs knew of the procedures available to them and determined to repair to the court as an advised choice.[6]

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[5] The facts and the statistics of the current strains on judicial capacities need not be reiterated here. See e.g., Remarks of Warren E. Burger, Chief Justice of the United States, to the American Bar Association, August 6, 1973.

[6] Where alleged frustration of administrative remedy is based on lack of information or misinformation concerning the correct procedural route to follow, it is at least questionable whether failure to exhaust should be excused if before suit is filed the complaining party is advised by counsel of the correct procedural route to follow administratively.

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These are not mere niceties of pleading. The Supreme Court has accepted as desirable ends the establishment and utilization of institutional remedies, as has this court. *See, e.g., Stevenson v. Board of Education of Wheeler County,* 426 F.2d 1154 (CA5), *cert. denied,* 400 U.S. 957, 27 L.Ed.2d 265 (1970); *Lucas v. Chapman,* 430 F.2d 945 (CA5, 1970); *Ferguson v. Thomas,* 430 F.2d 852 (CA5, 1970); *Wood v. Alamo Heights Indep. School Dist.,* 433 F.2d 355 (CA5, 1970). If in fact Penn and Foster were not thrown off the track by the allegedly incomplete or inaccurate information given them, or if they learned of the correct procedure before reaching the doors of the courthouse, the policies undergirding exhaustion require that they must exhaust.

I am not unmindful that the complaint may adequately allege failure on the part of Maxwell Air Force Base EEO designees to comply with their duties. Counselors, for example, whom aggrieved employees must consult before taking any other step, are charged with the affirmative duty of providing written notice of the right to file a formal complaint. See 5 C.F.R. § 713.213(a). Nevertheless, I believe the review procedures set up by the Civil Service Commission regulations are objectively so comprehensive and so fair that *McKart* requires us to find the failures here alleged insufficient to justify permitting these plaintiffs to circumvent them. The same factors which, when applied as *McKart* sets out, command that exhaustion be required also mandate that the courts not permit departure from the requisite exhaustion on anything less than very strong grounds.

In this case there is an additional factor not present in *McKart*. The District Court held that the complaint states claims against the individual government officers under *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 93 L.Ed. 1628 (1949), and *Dugan v. Rank*, 372 U.S. 609, 10 L.Ed.2d 15 (1963). We cannot know whether under the prayer for other and general relief all members of the class will seek back pay. But it seems to me that the mere exposure of individual government officers to the possibility of personal back pay liability is manifestly unfair. Under the administrative procedure there is no problem of sovereign immunity, and back pay awards, if any, can be assessed against the government.

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IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

[Filed October 9, 1972
by Jane P. Gordon, Clerk]

WILLIE PENN, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CIVIL ACTION NO. 3638-N
	)	
MELVIN R. LAIRD, ETC., ET AL.,	)	
	)	
	)	
Defendants.	)	

CERTIFICATE

This Court is of the opinion and hereby certifies that the order made and entered in this case this date, whereby the United States of America was dismissed as a party defendant and the motion of the individual defendants seeking dismissal was denied, involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. This certificate is made pursuant to 28 U.S.C. § 1292.

Done, this 9th day of October, 1972.

/s/ Frank M. Johnson, Jr.
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

WILLIE PENN, ET AL., Plaintiffs,	)	
vs.	)	CIVIL ACTION NO. 3638-N
UNITED STATES OF AMERICA, ET AL., Defendants.	)	

O R D E R

Plaintiffs Penn and Foster bring this class action against the United States and various named individuals as heads of departments and agencies of the United States who have offices, agents, and a portion of their operations located in this district in Alabama. The plaintiffs charge the defendants with systematic racial discrimination in hiring and promotion. Plaintiffs allege jurisdiction under Title 28, United States Code, Sections 2201, 1331, 1343(4), 1346(a)(2), and 1361.

The gist of the plaintiffs' allegations of racial discrimination is that the percentage of

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black General Schedule (GS) employees in the agencies headed by the individual defendants who are oeprating in Alabama is 2.6 percent of the total number of said employees,[1/] while blacks comprise 26.4 percent of the population of Alabama. This disparity is alleged to be the result of specific practices constituting systematic discrimination based solely on race. Plaintiffs Penn and Foster, claiming to represent the class of those so discriminated against, allege specific acts of discrimination on the part of employing and promoting officials of Maxwell Air Force Base located in Montgomery, Alabama. Plaintiffs seek a declaration that defendants have engaged in and continue to engage in the practice of denying blacks in Alabama an equal right to contract for employment in violation of Title 42, United States Code, Section 1981 and

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1/ Of the 27,391 GS employees employed in the various agencies and departments headed by the individual defendants, only 739 are black.

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that defendants have engaged in and continue to follow a practice of systematic employment discrimination against blacks in Alabama in violation of the Fifth Amendment to the Constitution of the United States. They seek an order in the nature of mandamus compelling defendants to perform their duty under Executive Order 11478 and further seek an order requiring affirmative action on the part of the defendants to eliminate the effects of past discriminatory practices. The case is now submitted upon defendants' motion to dismiss claiming that this Court lacks jurisdiction over the subject matter. Specifically, the motion to dismiss presents issues as to whether plaintiffs' claims are barred by the doctrine of sovereign immunity and whether plaintiffs have failed to exhaust the available administrative remedies prior to initiating this action.

I. SOVEREIGN IMMUNITY

While the doctrine of sovereign immunity has been severely criticized by courts and commentators, it is, nevertheless, well settled in the

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Fifth Circuit and throughout the federal judiciary that the United States cannot be sued without its consent. See, e.g., *Blaze v. Moon*, 440 F.2d 1348, 1349 (5th Cir. 1971), and cases cited therein. The plaintiffs, recognizing this general proposition, contend, however, that the United States has consented to be sued in instances such as those now presented and even if the United States as an entity has not consented to be sued, this is in reality a suit against the individual officers named as defendants. The doctrine of sovereign immunity does not bar such an action against individual officers of the United States.

This Court has concluded that to the extent that the plaintiffs attempt to sue the United States their action is barred by the doctrine of sovereign immunity.[2/] This Court is unwilling

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2/ It is, of course, regrettable that, having so vigorously brought and prosecuted actions against various Alabama agencies to ensure equal education and employment for blacks, the United States government should now be forced to interpose such a defense as the doctrine of sovereign immunity to a charge of racial discrimination in employment.

to say that Title 42, United States Code, Section 1981 amounts to a consent on the part of the United States to be sued. In support of their contention that Section 1981 runs against the federal government, plaintiffs argue that consent can be inferred from the language of the statute itself and from recent cases holding that the statute is founded on the Thirteenth Amendment as well as the Fourteenth and is therefore not limited to state action. It is well-settled law, however, that a waiver of sovereign immunity must be specific and explicit and cannot be implied by construction of an ambiguous statute. *United States v. Shaw*, 309 U.S. 495 (1940); *Barefield v. Byrd*, 320 F.2d 455 (5th Cir. 1963), cert. denied 376 U.S. 928 (1964). Any doubt as to this issue was put to rest by the Fifth Circuit's recent decision in *Beale v. Blount*, 461 F.2d 1133 (5th Cir. 1972), which held a Section 1981 suit for injunctive relief against the federal government to be barred by the doctrine of sovereign immunity. That decision is controlling in this circuit and forecloses further

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discussion of the sovereign's consent to be sued under Section 1981. Consequently, as to the United States, this action will be dismissed.

II. INDIVIDUAL OFFICIALS AS DEFENDANTS

In determining whether an action comes within the purview of the sovereign immunity doctrine, the critical consideration is not the identity of the parties but rather the result of the judgment or decrees that might be entered. *Carter v. Seamans*, 411 F.2d 767, 770 (5th Cir. 1969). The general rule, stated in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) and *Dugan v. Rank*, 372 U.S. 609 (1963), and reiterated in this circuit in *Carter v. Seamans*, is that a suit is against the sovereign if the judgment sought would expend itself on the public territory or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the government from acting or to compel it to act.

There are, however, two well-recognized instances where suits for specific relief against

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public officers are not considered to be against the sovereign.

> In these two instances the sovereign's consent to be sued is not required and the defense of sovereign immunity is not available. Thus, the actions of a public officer can be made the basis of a suit for specific relief against the officer as an individual if, but only if, (1) the officer's action is beyond his statutory powers, or (2) if within those powers, the powers themselves or the manner in which they are exercised are constitutionally void.

Carter v. Seamans, 411 F.2d at 770, citing *Larson v. Domestic & Foreign Commerce Corp.*, *supra*, and *Dugan v. Rank*, *supra*.

As the court in *Carter* points out, a determination of the sovereign immunity issue to some extent requires a ruling on the ultimate questions in the suit. In order to avoid deciding a case on the merits under the guise of resolving the preliminary jurisdictional issues, however, courts are said to have adopted the procedure, specifically applied in *Carter*, "of accepting at face value, for jurisdictional purposes, the averments

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of the complaint unless they are so transparently insubstantial or frivolous as to afford no possible basis for jurisdiction, and of giving the averments thus accepted their natural jurisdictional consequences." 441 F.2d at 770.

In applying that technique in the case before it, the court in *Carter* found that for jurisdictional purposes only "the case *sub judice* is not against the United States, but rather one to compel the Secretary of the Air Force to perform a clear legal duty." 411 F.2d at 771. Accordingly, it was held that the defense of sovereign immunity was not available and that defendant's jurisdictional objection based thereon must fail.

To the extent that the present case resembles *Carter*, the doctrine of sovereign immunity is likewise not available to defendants, and their jurisdictional objections based thereon must consequently fail. This result is not affected by *Beale v. Blount*, 461 F.2d 1133 (5th Cir. 1972), *Blaze v. Moon*, 440 F.2d 1348 (5th Cir. 1971), or *Gnotta v. United States*, 415 F.2d 1271 (8th

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Cir. 1969), on which defendants rely. The court in *Beale* and the court in *Blaze* found no *Larson-Dugan* exceptions to the doctrine of sovereign immunity. The *Gnotta* court mentioned the exceptions but concluded that the evidence and findings the court had before it by virtue of a prior administrative proceeding reflected that the case "obviously" did not come within either of the *Larson-Dugan* exceptions.

Thus, adhering to the principles of *Carter v. Seamans*, this Court must accept at face value for jurisdictional purposes the averments of the complaint. With regard to the individual defendants, the averments of the complaint clearly state claims falling within the *Larson-Dugan* exception to the doctrine of sovereign immunity which permits actions against officers of the United States whose exercise of their powers is alleged to be constitutionally void.[3/]

3/ This Court finds it unnecessary to rule on whether Section 1981 runs against federal officers. Consequently, it is unnecessary to determine whether a claim based on Section 1981 falls within the *Larson-Dugan* exception which allows suits against officers whose acts are alleged to be beyond their statutory powers.

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III. SOVEREIGN IMMUNITY IN ACTIONS AGAINST INDIVIDUAL OFFICIALS

In a footnote in *Larson v. Domestic & Foreign Commerce Corp., supra,* the Supreme Court discussed the possibility that even though one of the exceptions to sovereign immunity might be applicable, certain types of relief would not be granted:

> Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property.

337 U. S. at 692, n. 11 (emphasis added). The Court of Appeals for the Ninth Circuit, however, reaffirmed in *State of Washington v. Udall,* 417 F.2d 1310 (9th Cir. 1969), its pre-*Larson* position that "may" did not mean "must." The court concluded that even affirmative relief should be granted except where "an intolerable burden on government functions" would result. 417 F.2d at 1318.

Nothing in *Ogletree v. McNamara*, 449 F.2d 93 (6th Cir. 1971), cited by defendants, holds contrary to *State of Washington v. Udall*. To grant relief of the type prayed for in *Ogletree* would clearly place an intolerable burden on government functions within the meaning of *State of Washington v. Udall*. However, in the case *sub judice* the relief requested would not constitute such a burden. The *Larson-Dugan* exceptions to the doctrine of sovereign immunity are, of course, normally limited, as the court in *Larson* made clear, to suits for specific relief. However, the court in *Larson* defines specific relief as "the recovery of specific property or monies . . . or injunction either directing or restraining the defendant officer's actions." 337 U.S. at 688. Thus, it is clear that specific relief allowable by *Larson* includes claims for back wages as well as a request for injunctive relief.

IV. EXHAUSTION OF REMEDIES

It is rather basic that available administrative remedies must be exhausted before a court

will decide a constitutional question. *W.E.B. DuBois Clubs of America v. Clark*, 389 U.S. 309 (1967). In *Beale v. Blount, supra*, on which defendants heavily rely, the Fifth Circuit affirmed the dismissal of a discharged federal employee's complaint for failure to exhaust administrative remedies. An important distinction between *Beale* and the present case, however, is that in *Beale* the plaintiff made no attempt to exhaust his administrative remedies with respect to his claim of racial discrimination or even to allege that resort to the administrative processes would be a meaningless ritual.[4/] The plaintiff in *Beale* merely claimed that he did not need to present his claim of racial discrimination for administrative determination before bringing suit in federal court. In the case *sub judice*

4/ The Sixth Circuit's decision in *Ogletree v. McNamara, supra*, relied on by defendants, is likewise distinguishable inasmuch as that case was a case brought under Executive Order 11478 which created the remedies defendants claimed had not been exhausted.

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plaintiffs specifically allege that they attempted to exhaust administrative remedies, only to be thwarted in the initial stages of those proceedings by federal officials charged with the duty of hearing complaints of racial discrimination and informing plaintiffs of additional channels of appeal. Plaintiff Penn claims he was not told by his Equal Employment Counselor, to whom he complained, of his right to file a complaint. Plaintiff Foster, who did register a complaint with the Equal Employment Officer, claims he was told there was nothing left for him to do but bring suit in federal court. Thus, the issue of exhaustion of administrative remedies in the present case reduces to an issue of the legal sufficiency of plaintiffs' abortive attempts to exhaust available remedies.

Accepting plaintiffs' allegations as true for the limited purpose of considering defendants' motion to dismiss, it is clear that with regard to those remedies granted by Executive Order 11478 plaintiffs have adequately exhausted their

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administrative remedies. Their failure to go further in the administrative processes is solely due to the breach of duty expressly imposed on certain employees of the individual defendants. See 5 C.F.R. §§ 713.213-713.215.5/

It clearly appears, therefore, that to the extent necessary the plaintiffs in the case now before this Court have sufficiently alleged exhaustion of their administrative remedies.

5/ Defendants' reliance on *Douglas v. Hampton*, Civil Action No. 313-71 (D.C.D.C., February 17, 1972) is misplaced. *Douglas* is no authority for the proposition that individuals such as the plaintiffs must pursue the administrative remedies created by the Equal Employment Opportunity Act of 1972. The court in *Douglas* was acting on a motion to remand to the Civil Service Commission, not a motion to dismiss.

In considering that motion, the court said "although not required by plaintiffs' failure to exhaust later-created remedies, [the court] has discretion, in the interest of sound judicial administration, to remand where the agency has general jurisdiction of, and a particular expertise in, the issues presented.

In accordance with the foregoing, it is the ORDER, JUDGMENT and DECREE of this Court:

1. That the motion to dismiss filed by the United States of America be and the same is hereby granted.

2. That the motion to dismiss filed by the individual defendants be and the same is hereby denied.

It is further ORDERED that the parties be and they are hereby, after the expiration of fifteen days from this date, authorized to proceed with their discovery.

Done, this the 9th day of October, 1972.

s/ Frank M. Johnson, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA,

NORTHERN DIVISION

WILLIE PENN, Individually and on behalf of the class similarly situated.	)	
ALABAMA STATE CONFERENCE OF NAACP, INC., a nonprofit Alabama corporation individually on behalf of its black members and on behalf of the class similarly situated.	)	
Plaintiffs,	)	
vs.	)	CIVIL ACTION
UNITED STATES OF AMERICA	)	NO. 3638-N
MELVIN R. LAIRD, individually and as Secretary of Defense, his agents, assigns, and successors in office.	)	
JOHN B. CONNALLY, JR., individually and as Secretary of the Treasury, and his agents, assigns, and successors in office.	)	
RICHARD KLEINDEINST, individually and as acting Attorney General, Justice Department, and his agents, assigns, and successors in office.	)	

ROGERS C.B. MORTON, individually and as Secretary of the Interior, and his agents, assigns, and successors in office.

EARL L. BUTZ, individually and as Secretary of Agriculture, and his agents, assigns, and successors in office.

MAURICE H. STANS, individually and as Secretary of Commerce, and his agents, assigns, and successors in office.

JAMES D. HODGSON, individually and as Secretary of Labor, and his agents, assigns, and successors in office.

ELLIOT L. RICHARDSON, individually and as Secretary of Health, Education and Welfare, and his agents, assigns, and successors in office.

GEORGE W. ROMNEY, individually and as Secretary of Housing and Urban Development, and his agents, assigns and successors in office.

JOHN A. VOLPE, individually and as Secretary of Transportation, and his agents,

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assigns, and successors in office.

ROBERT L. KUNZIG, individually and as Director, General Services Administration, United States Government, and his agents, assigns, and successors in office.

ELMER B. STAATS, individually and as Comptroller General, General Accounting Office, United States Government, and his agents, assigns, and successors in office.

DR. JAMES C. FLETCHER, individually and as Chairman, National Aeronautics and Space Administration, and his agents, assigns, and successors in office.

ELMER T. KLASSEN, individually and as Postmaster General, U.S. Postal Service, and his agents, assigns, and successors in office.

HOWARD W. HABERMEYER, individually and as Chairman, Railroad Retirement Board, United States Government, and his agents, assigns, and successors in office.

THOMAS S. KLEPPE, individually and as Administrator,

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Small Business Administration, and his agents, assigns, and successors in office.

DR. CURTIS W. TARR, individually and as Director, Selective Service System, United States Government, and his agents, assigns, and successors in office.

Defendants.

C O M P L A I N T

I

JURISDICTION

The jurisdiction of this Court is invoked under the Fifth Amendment to the Constitution of the United States; Title 42 U.S.C 1981; Title 28 U.S.C. 2201, 1331, 1343 (4), 1346 (2), and 1361; Executive Order No. 11478, 34 F.R. 12985 as amended by Executive Order No. 11590, 36 F.R. 7831. The amount in controversy exceeds the sum of Ten Thousand Dollars ($10,000), exclusive of interest and cost.

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II

CLASS ACTION

Willie Penn and The Alabama State Conference of NAACP, Inc. bring this action on his own behalf, on behalf of the members of said organization and on behalf of all blacks in Alabama similarly situated pursuant to Rule 23, FRCP.

There are common questions of law and fact affecting the rights of such persons to be free from violations of their civil rights by persons acting under color of law and/or acting individually. The members of plaintiff's class are so numerous as to make it impractical to bring them all before this Court. The claims of the individual plaintiff and the claims that the organizational plaintiff assert on behalf of itself and its members and the class are typical of the claims of the class, as to relief requested. The prosecution of separate actions by individual members of the class would create a risk of:

(a) inconsistent or varying adjudications with respect to individual members of the class, or

(b) adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interest of the other members not parties.

The questions of law and fact common to the class predominate over any affecting only individual members of the class, and the class action is the superior and most efficient method for fair adjudication of the controversy.

III

PARTIES

PLAINTIFFS:

(1) Willie Penn is over the age of 21, a U.S. citizen and a resident of Montgomery County, Alabama. He has been employed by the defendant United States of America through the Department of Defense since August, 1952. He is a member of the black race.

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(2) The Alabama State Conference of NAACP, Inc., commonly known as and referred to hereinafter as the NAACP, is a nonprofit Alabama corporation with several thousand members residing in Alabama. The great majority of the members of the NAACP are black. The chartered purpose of the NAACP is the representation of its members in specific, and blacks in general, to eliminate racial prejudice and discrimination against blacks and to take all lawful action to secure the exercise of Federal and state laws securing their civil rights. Members of the NAACP, primarily blacks, join the organization and pay dues to enable the NAACP to carry out the objectives set out above. Black members of the NAACP in Alabama have interests in common and these interests center around the elimination of racial discrimination in any form, particularly in economic matters. The interests of the NAACP and its members are the same. The NAACP asserts and protects the interests of all members of the black race in Alabama against discrimination, both governmental and individual, regardless of whether

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these black persons are members of the NAACP. The NAACP, in the legal actions it undertakes, is furthering and protecting both the interests of its members and all Alabama blacks. The NAACP is adequate and able to represent and protect the interests of Alabama blacks. *NAACP v. Allen*, ___ F.Supp. ___ (MD Ala. 1972); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

DEFENDANTS:

(3) The United States of America is the employer of the individual plaintiffs, throughout its various departments, agencies, and other offices created either by Congress or Executive Order. The United States of America, through its various departments, agencies, and other offices, is the agent of racial discrimination purportrated against the plaintiffs as more fully set out herein.

(4) Melvin R. Laird is Secretary of Defense. He is over the age of 21, a U.S. citizen and maintains his office in Washington, D.C. He is the

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person ultimately responsible in the Department of Defense.

(5) John B. Connally, Jr., is Secretary of the Treasury. He is over the age of 21, a U.S. citizen and maintains his office in Washington, D.C. He is the person ultimately responsible in the Department of the Treasury.

(6) Richard Kleindeinst is acting Attorney General, Justice Department. He is over the age of 21, a U.S. citizen and maintains his office in Washington, D.C. He is the person ultimately responsible in the Justice Department.

(7) Rogers C.B. Morton is Secretary of the Interior. He is over the age of 21, a U.S. citizen and maintains his office in Washington, D.C. He is the person ultimately responsible in the Department of the Interior.

(8) Earl L. Butz is Secretary of Agriculture. He is over the age of 21, a U.S. citizen and maintains his office in Washington, D.C. He is the person ultimately responsible in the Department of Agriculture.

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(9) Maurice H. Stans is Secretary of Commerce. He is over the age of 21, a U.S. citizen and maintains his office in Washington, D.C. He is the person ultimately responsible in the Department of Commerce.

(10) James D. Hodgson is Secretary of Labor. He is over the age of 21, a U.S. citizen and maintains his office in Washington, D.C. He is the person ultimately responsible in the Department of Labor.

(11) Elliot L. Richardson is Secretary of Health, Education and Welfare. He is over the age of 21, a U.S. citizen and maintains his office in Washington, D.C. He is the person ultimately responsible in the Department of Health, Education and Welfare.

(12) George W. Romney is Secretary of Housing and Urban Development. He is over the age of 21, a U.S. citizen and maintains his office in Washington, D.C. He is the person ultimately responsible in the Department of Housing and Urban Development.

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(13) John A. Volpe is Secretary of Transportation. He is over the age of 21, a U.S. citizen and maintains his office in Washington, D.C. He is the person ultimately responsible in the Department of Transportation.

(14) Robert L. Kunzig is Director, General Services Administration, United States Government. He is over the age of 21, a U.S. citizen and maintains his office in Washington, D.C. He is the person ultimately responsible in the General Services Administration.

(15) Elmer B. Staats is the Comptroller General, General Accounting Office, United States Government. He is over the age of 21, a U.S. citizen and maintains his office in Washington, D.C. He is the person ultimately responsible in the General Accounting Office.

(16) Dr. James C. Fletcher is Chairman, National Aeronautics and Space Administration. He is over the age of 21, a U.S. citizen and maintains his office in Washington, D.C. He is the

person ultimately responsible in the National Aeronautics Administration.

(17) Elmer T. Klassen is Postmaster General, U.S. Postal Service. He is over the age of 21, a U.S. citizen and maintains his office in Washington, D.C. He is the person ultimately responsible in the U.S. Postal Service.

(18) Howard W. Habermeyer is Chairman, Railroad Retirement Board, United States Government. He is over the age of 21, a U.S. citizen and maintains his office in Chicago, Illinois. He is the person ultimately responsible in the Railroad Retirement Board.

(19) Thomas S. Kleppe is Administrator, Small Business Administration. He is over the age of 21, a U.S. citizen and maintains his office in Washington, D.C. He is the person ultimately responsible in the Small Business Administration.

(20) Dr. Curtis W. Tarr is Director, Selective Service System, United States Government. He is over the age of 21, a U.S. citizen and maintains his office in Washington, D.C. He is the person

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ultimately responsible in the Selective Service System.

IV

CAUSE OF ACTION

Plaintiffs reassert and incorporate paragraphs one through twenty above, and further state:

(21) The United States of America has 52,242 employees in Alabama. See Exhibit 1, Table 1. Of this total, 22,201 are blue collar or non General Schedule (GS) employees. Fifteen (15) percent of these non GS employees are blacks. The United States, through its departments, agencies and other offices, employs 30,041 GS employees (white collar) in Alabama. Only 6 percent of these GS employees in Alabama are black.

(22) Plaintiffs do not contend that every department, agency or other office of the United States of America is guilty of violating blacks' right to contract in employment based on race nor are the plaintiffs making every department, agency, or other office of the United States of America

a defendant even where the facts show that a prima facie case of racial discrimination exists. The following Federal departments, agencies or other offices appear not to deny blacks equal right to contract in employment: Equal Employment Opportunity Commission (51.5% black employees); Tennessee Valley Authority (8.7% blacks in an area of the State of Alabama that contains 12% blacks); and the Veterans Administration (43.3% blacks). See Exhibit 2, Table 2. If the number of black employees of the above agencies (T.V.A. has no GS designations) in the GS categories are eliminated from the total number of black GS employees in Alabama, the percentage of black GS employees of the defendants is reduced to 2.6%. (27,391 GS employees of which 739 are black.) The black population of Alabama is 26.4%.

The following departments, agencies, or offices indicate a prima facie case of denial of equal right to contract in employment to blacks, but the number of total employees of said agency in Alabama is so small so as to make inclusion of

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said agency as a defendant in this action meaningless: Federal Communications Commission (2 employees, no blacks); Federal Home Loan Bank Board (2 employees, no blacks); Federal Mediation and Consiliation Service (5 employees, no blacks); Interstate Commerce Commission (3 employees, no blacks); National Labor Relations Board (2 employees, no blacks). See Exhibit 2, Table 2.

(23) Defendant Melvin R. Laird, through the Department of Defense, has 1,899 GS Air Force employees in Alabama of which 33 or 1.7% are black; 14,000 GS Army employees in Alabama of which 235 or 1.7% are black; 35 Navy GS employees in Alabama of which none are black; 48 GS Defense Activities employees in Alabama of which none are black; and 366 GS Defense Supply Agency employees in Alabama of which 15 or 4.1% are black.

(24) Defendant John B. Connally, through the Treasury Department, has 689 GS employees in Alabama of which 24 or 3.5% are black. There are no black alochol and tabacco (sic) tax enforcement agents in Alabama.

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(25) Richard Kleindeinst, through the Department of Justice, has 264 GS employees in Alabama of which 11 or 4.2% are black. There are no black F.B.I. agents in Alabama.

(26) Defendant Rogers C.B. Morton, through the Department of Interior has 170 GS employees in Alabama of which 2 or 1.2% are black. There are no black Federal game wardens in Alabama.

(27) Defendant Earl Butz, through the Department of Agriculture, has 1,200 G.S employees in Alabama of which 33 or 2.7% are black.

(28) Defendant Maurice H. Stans, through the Department of Commerce, has 128 GS employees in Alabama of which 7 or 5.5% are black.

(29) Defendant James D. Hodgson, through the Department of Labor, has 81 GS employees in Alabama of which 5 or 6.2% are black.

(30) Defendant Elliot L. Richardson, through the Department of Health, Education, and Welfare, has 2,161 GS employees in Alabama of which 289 or 13.4% are black.

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(31) Defendant George Romney, through the Department of Housing and Urban Development, has 182 GS employees in Alabama of which 13 or 7.1% are black.

(32) Defendant John A. Volpe, through the Department of Transportation, has 414 GS employees in Alabama of which 4 or 1.0% are black.

(33) Defendant Elmer T. Klassen, through the U.S. Postal Service has 901 rural mail carriers in Alabama of which 2 or .002% are black. Said Defendant has 167 Fourth Class postmasters in Alabama, all in rural areas, of which 3 or 1.8% are black. The U.S. Postal Service has 7,329 PFS (equivilant to GS ratings) employees in Alabama of which 1,169 or 15.9% are black. A larger percentage of these black employees are in the lower PFS salary categories than white employees. See Exhibit 3, Table 3.

(34) Defendant Robert L. Kunzig, through the General Services Administration, employs 46 GS employees in Alabama of which 2 or 4.3% are black.

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(35) Defendant Elmer B. Staats, through the General Accounting Office, employs 12 GS employees in Alabama, none of which are black.

(36) Defendant Dr. James C. Fletcher, through the National Aeronautics and Space Administration, employs 5,454 GS employees in Alabama of which 57 or 1.0% are black.

(37) Defendant Howard W. Habermeyer, through the Railroad Retirement Board, employs 10 GS employees in Alabama, none of which are black.

(38) Defendant Thomas S. Kleppe, through the Small Business Administration, employs 37 GS employees in Alabama of which 4 or 10.8% are black.

(39) Defendant Dr. Curtis W. Tarr, through the Selective Service System, employs 17 GS employees in Alabama, none of which are black.

(40) Each of the above named defendants has engaged in a practice of denial of equal right to contract in employment in Alabama based on race in both hiring and promotion after hiring. Each of the above named defendants has engaged in a

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systematic practice of racial discrimination in employment of blacks in Alabama. The methods of denial of equal right to contract in employment and systematic discrimination based solely on race are: (a) the failure to actively and effectively recruit blacks, (b) the use of employment selection procedures such as nonvalidated employment and advancement tests, (c) oral selection interviews, (d) certification of three potential employees allowing the rejection of two to be based on any reason including race, (e) employment of persons without employment tests and without adequate guidelines to insure a nondiscriminatory hiring practice or with adequate guidelines that are arbitrarily disregarded, (f) the arbitrary selection of white persons over equally qualified blacks, (g) the promotion of less qualified whites or whites with less seniority than black employees; thereby causing the black employees of defendants in Alabama to be in the lower pay categories, and (h) invidious discrimination and denial of the

right to equal contract in employment based solely on race.

(41) Executive Order 11478 as amended by Executive Order 11590 directs defendant heads of departments and agencies to recruit black job candidates from all sources, to fully utilize present employment skills of blacks, to enhance upward mobility of presently employed blacks, and to in general take steps to increase the number of black employees in their departments. The defendants have failed and refused to carry out the letter and spirit of these Executive Orders and have totally failed to accomplish any meaningful increase in employment of blacks in the Federal work force in Alabama. Also the defendants have failed to "enhance the upward mobility" of their black Alabama employees. The percentage of black GS employees in the defendants' departments and agencies that are under this lawsuit is only 2.6% (27,391 with 739 blacks). The black population of Alabama is 26.4%.

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(42) Defendant Kleindeinst, through the Justice Department, and defendant Richardson, through the Department of Health, Education, and Welfare, have brought suits, entered suits as amicus, issued agency rulings, and have taken numerous other punitive actions against states, school boards, and other state agencies receiving Federal funds to force equal employment of blacks. *U.S. v. Frazier,* 317 F.Supp. 1079 (MD Ala., 1970). In a recent such suit, the Justice Department urged the Court to require Alabama State Troopers to hire 25% blacks because Alabama had no black State Troopers. Yet Alabama, with 19,296 merit system employees (equivalent to GS), exceeds the Federal Government in percentage of black employees in GS positions with 7.2%.

(43) Plaintiff Willie Penn was employed by the Department of Defense in December, 1952, as a non GS employee in the Motor Pool at Maxwell Air Force Base, Alabama. In 1955 he was transferred to Base Procurement, Maxwell Air Force Base, Department of Defense and given a GS 1 rating.

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After 20 years as an employee of the Defense Department in the Base Procurement section at Maxwell Air Force Base, Mr. Penn has only been promoted to GS 5. Based on his experience, ability, training, seniority, and job knowledge, he should be in the GS 10 to 11 category. The failure of Mr. Penn's white superiors to promote him is based solely on his race. At frequent intervals since 1955, positions carrying a higher GS rating in the Base Procurement section at Maxwell were announced. Mr. Penn consistently applied for these positions. In each instance, a white person received the position, and in each instance Mr. Penn was equally or better qualifed for the position by experience, training, or seniority. Mr. Penn let his supervisor know that he was desirous of receiving a promotion to any better paying or to one that carried more responsibility. Mr. Penn put his superiors on notice of his desire of advancement. Mr. Penn's superiors, under a directive by Executive Order 11478 to "enhance upward mobility" of existing black employees and to "fully utilize the present

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skills of black employees," failed and refused to advance Mr. Penn on an equal basis with white employees. Mr. Penn's superiors in the Base Procurement section of the Defense Department denied to Mr. Penn the equal right to contract in employment. This violation of Mr. Penn's employment rights continued from 1960 to date. The last violation of Mr. Penn's right to equal contract occurred in June, 1971, when two Procurement Analyst positions carrying GS ratings up to 9 were filled by whites with less experience, training, and seniority than Mr. Penn. Mr. Penn's superiors have a duty under Executive Order 11478 to seek out blacks in the Base Procurement section for these positions, especially in light of the few blacks employed by the section (3 out of 40) and the low GS ranking of existing black employees who were qualified for the positions by experience, training and seniority. No test or competitive examination was given to determine the best qualified person for these promotions. The white person making the selection artibrarily selected

less qualified white persons to fill the positions thereby violating Mr. Penn's statutory ard constitutional rights. The loss of income to Mr. Penn from these continued violations of his equal right to contract in employment exceeds $10,000.00.

(44) The failure of defendants to effectively recruit blacks in Alabama for employment in their departments or agencies as directed by Executive Order 11478 and as mandated by the Constitution of the United States and T42 U.S.C. 1981 have violated the rights of all blacks in Alabama who, because of the failure of defendants to adequately recruit blacks, were not offered a job opportunity and a job preference created by the law.

(45) The use by defendants of employment entrance tests in Alabama where blacks scored lower than whites on the average and where such tests had not been validated to job performance, resulted in many blacks not receiving jobs. The use of such tests violated the rights of black test takers.

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RELIEF REQUESTED

Plaintiffs request the following relief for themselves and for the class:

(46) A declaration that the defendants have engaged in a practice of denial of equal right to contract with blacks in Alabama in employment and that such practice is a violation of 42 U.S.C. 1981.

(47) A declaration that the defendants have engaged in a practice of systematic discrimination against blacks in employment based solely on race and that such practice is a violation of the Fifth Amendment to the United States Constitution.

(48) A declaration that the defendants have violated Executive Order 11478.

(49) An order compelling the defendants to perform their duty under Executive Order 11478. This order is in the nature of mandamus as authorized under 28 U.S.C. 1361.

(50) An order requiring the defendants to institute a practice of hiring one black for every one white hired until the ratio of blacks in defendants' Federal jobs in Alabama is approximately in proportion to the percentage of blacks in Alabama's population. A further order that no exception shall be made in the above hiring ratio without approval of the Court.

(51) An order requiring the Department of Defense to immediately increase the GS rating of Plaintiff Willie Penn to GS 11 and to promote Plaintiff Penn into the next available position in Base Procurement for which he is qualified comparable to his new GS rating. A further order requiring the Department of Defense to pay plaintiff a sum of money, including interest, to represent the salary that Plaintiff Penn would have received had he been promoted during his employment with the Department of Defense without regard to race on a nondiscriminatory basis.

(52) An order granting the Plaintiffs and the class such other and further relief the Court

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deems necessary to protect the rights of Plaintiffs and the class.

(53) An order setting this case down for an early hearing.

Respectfully submitted,

s/ Morris Dees

Morris Dees
Box 2087
Montgomery, Alabama
(205) 264-1412

s/ Orzell Billingslea, Jr.

Orzell Billingslea, Jr.
1630 Fourth Ave., N.
Birmingham, Alabama

s/ J. L. Chestnut, Jr.

J. L. Chestnut, Jr.
1020 Broad Street
Selma, Alabama

PLAINTIFF'S ATTORNEY

Of Counsel:

Joseph J. Levin, Jr.
General Counsel
The Southern Poverty Law Center
Room 105
Washington Building
Montgomery, Alabama

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TABLE 1

Federal Employees in Alabama

All Job Categories[1]

	Total	Blacks	%	White	%
All Jobs	52,242	5,230	10	47,013	90
Non General Schedule[2]	22,201	3,343	15	18,853	85
Total General Schedule[3]	30,041	1,887	6	28,154	94
Defendants General Schedule Totals[4]	27,391	739	2.6	26,654	97.4

[1]Minority Group Employment in the Government, November 30, 1970, SM 70-70B. United States Civil Service Commission.

[2]Blue Collar jobs. Also included in this category are United States Postal Service jobs. These jobs carry Postal Field Service (PFS) ratings and not General Schedule. The Tennessee Valley Authority does not use General Schedule ratings. See Table 2 for the number of employees in these departments.

[3]Total General Schedule or white collar jobs. Included in this total are the departments or agencies not included in this suit.

EXHIBIT 1
(page 1 of 2)

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[4]Total General Schedule employees of the defendants in this suit.

EXHIBIT 1
(page 2 of 2)

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TABLE 2

GENERAL SCHEDULE

Federal Employees in Alabama

By Departments and Agencies[1]

Department or Agency	Total General Schedule Employees	Black	% Black
Cabinet Level Departments:			
Dept. of Defense:			
Air Force	1,899	33	1.7
Army	14,100	235	1.7
Navy	35	0	0
Other Defense Activities	48	0	0
Defense Supply Agency	366	15	4.1
Dept. of Agriculture	1,200	33	2.7
Dept. of Commerce	128	7	5.5
Dept. of Justice	264	11	4.2
Dept. of Labor	81	5	6.2
Dept. of Interior	170	2	1.2
Dept. of Health, Education and Welfare	2,161	289	13.4
Dept. of Housing and Urban Development	182	13	7.1
Dept. of Transportation	414	.4	1.0
Dept. of Treasury	689	24	3.5

EXHIBIT 2
(page 1 of 3)

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TABLE 2 (continued)

Department or Agency	Total General Schedule Employees	Black	% Black
Agencies and Executive Divisions:			
U.S. Civil Service	39	3	7.7
Equal Employment Opportunity Commission	33	17	51.5
Federal Communications Commissions	2	0	0
Federal Depository Insurance Corp.	18	0	0
Federal Home Loan Bank Board	2	0	0
Federal Mediation and Consiliation Service	5	0	0
General Services Administration	46	2	4.3
Interstate Commerce Commission	3	0	0
General Accounting Office	12	0	0
National Labor Relations Board	2	0	0
National Aeronautics and Space Administration	5,454	57	1.0
U. S. Postal Service:[2]			
Rural Mail Carriers	901	2	.002
Fourth Class Postmasters	167	3	1.8
Postal Employees	7,329	1,169	15.9

EXHIBIT 2
(page 2 of 3)

TABLE 2 (continued)

Department or Agency	Total General Schedule Employees	Black	% Black
Railroad Retirement Board	10	0	0
Small Business Administration	37	4	10.8
Selective Service System	17[3]	0	0
Tennessee Valley Authority	6,338	551	8.7
Veterans Administration	2,617	1,133	43.3

[1]Minority Group Employment in the Federal Government, November 30, 1970, SM 70-70B. United States Civil Service Commission.

[2]See Table 3. United States Postal Service uses PFS (Postal Field Service) pay categories. Blacks are clustered in the lower PFS categories.

[3]Selective Service in Alabama has 139 employees in Alabama of which 17 are in General Schedule categories. All 139 are white.

EXHIBIT 2
(page 3 of 3)

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TABLE 3

SALARY CLASSIFICATIONS

United States Postal Service

In the State of Alabama[1]

PFS[2] Category	Total	Black	Percentage Black
1-4	1,829	267	14.5
5-8	5,192	893	17.0
9-17	104	9	2.3
Totals	7,329	1,169	15.9

[1]Minority Group Employment in the Government, November 30, 1970, SM 70-70B. United States Civil Service Commission.

[2]Postal Field Service (PFS) is the designation of salary categories similiar to General Schedule.

EXHIBIT 3

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

WILLIE PENN, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CIVIL ACTION NO. 3638-N
	)	
UNITED STATES OF AMERICA, ET AL.,	)	
	)	
	)	
Defendants.	)	

AMENDMENT TO COMPLAINT

Come now the Plaintiffs pursuant to Rule 15(a), FRCP, and amend their complaint by adding as a named plaintiff, Charlie H. Foster, Jr., and by adding additional averments under sections I, III and IV of the original complaint. The amendment is as follows.

I

JURISDICTION

Plaintiffs also invoke jurisdiction under the Thirteenth Amendment to the Constitution of the United States.

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III

PARTIES

PLAINTIFFS:

(1 a.) Charlie H. Foster, Jr. is over the age of twenty-one (21), a U. S. citizen and resident of Montgomery, Alabama. He has been employed by the United States of America through the Department of Defense since July, 1966. He is a member of the Negro race.

IV

CAUSE OF ACTION

(43.) The supervisor to whom Plaintiff Penn made complaints and made known his desire to fill any better paying or more responsible position was Ruth Hunter (see Original Complaint, pp. 9-10, paragraph 43). In addition to Mrs. Hunter's position as head of Procurement, she is also the alternate Chief Counselor for Equal Employment Opportunity at MAFB (Ex. A). Mrs. Hunter never informed Plaintiff Penn of his right to file a complaint with an E. E. O. Officer. Under 5 CFR

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713.213(a) it was Mrs. Hunter's legal duty to advise Plaintiff of his right to file such complaints.

(43 a.) Charlie H. Foster, Jr. served in the United States Navy from 1955 to 1959 when he was honorably discharged. His principal activities consisted of duties related to the engine rooms of ships and he was expertly trained in the operation of steam and boiler room-type equipment.

In July, 1966, Mr. Foster accepted employment with the Department of Defense at a grade of Wage Board II and a salary of $1.58 per hour. His duties were those of Mess Attendant at Maxwell Air Force Base (MAFB), Alabama. He remained in that position until January, 1969, when he was promoted to Wage Board VI at a salary of $2.31 per hour. His job description was converted to that of Motor Vehicle Operator at Gunter Air Force Base (GAFB), Alabama.

Plaintiff Foster, during early 1967, while serving as Mess Attendant at MAFB, was

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informed by several white airmen that slots in a Wage Board 10 grade were open in the MAFB steam plant. Mr. Foster immediately went to a Mrs. Taylor at Base Personnel and made application for such a position. He continued to hear of openings and every day for a period of some six months he went to Personnel, but was never considered for the opening. Finally, Mrs. Taylor informed Mr. Foster that he was coming to Personnel too often and he gave up. A Wage Board 10 employee at that time received a salary of some $8,000 per year.

The duties encompassed at the MAFB steam plant were much less complicated than those which Mr. Foster performed while in the Navy. He was eminently qualified for such work. His qualifications were included in his personnel record at MAFB and he also verbally informed Personnel of his experience.

No black man has ever been employed in the steam plant position sought by Mr. Foster. It is well known among blacks at MAFB that this is strictly "a white man's job."

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Mr. Foster continued in the position of Motor Vehicle Operator until February, 1970, when he was promoted to GS-3 in the clerk-typist category at a salary of $5,200 per year. In order to accept the position he was required to transfer to the Procurement Office at MAFB. The job slot which Mr. Foster filled was previously held by a white man whose grade was that of GS-4. When Mr. Foster questioned Mrs. Ruth Hunter as to why the slot was downgraded, he was informed that that was the only way Mr. Foster could qualify for the job. However, Mr. Foster believes that such a statement was not true. Subsequently (after Mr. Foster assumed the position) two men were transferred from Wage Board to GS status in Procurement and were permitted to fill the graded slots as they existed with no downgrade.

In October of 1969, Mr. Foster, after two years of study, received a certificate in Accounting from Floyd Commercial Business School.

Mr. Foster remained a GS-3 in Procurement for twenty-one months. In November, 1971,

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Mrs. Denoise, his supervisor, upgraded his job description to that of Procurement Clerk, a GS-4, at a salary of $5,853 per year.

During Summer, 1971, Mr. Foster became aware of two GS-5 positions which were opening up in Procurement. He then made Mrs. Ruth Hunter aware that he would like to fill one of these vacancies. The jobs were as follows:

(1) Contract Specialist, at salary of $7,000 per year and,

(2) Procurement Assistant, at salary of $7,000 per year.

Mr. Foster never received a response to his request for consideration, but learned that the jobs had been given to two white women. Neither had better than a high school education, both had been in MAFB Procurement for less than one year and both had been GS-4's. As a matter of fact one of the women because of her failure to have been in Procurement for more than one year was placed in her slot in an acting capacity until

the one year requirement had been met. She is now a GS-5.

Plaintiff Foster then called a Mr. Glenn, Chief Counselor for Equal Employment Opportunity at MAFB. Glenn referred Mr. Foster to A. C. Carter, Equal Employment Opportunity Officer, a white man. Plaintiff had a meeting with Mr. Carter in which he asked Carter to check the eligibility roster (promotion register) to determine where his (Foster's) name was in relation to the two ladies who had been promoted. Carter would not give Foster that information, and during the course of the conversation indicated to Mr. Foster that he would have to file a suit if he expected to carry his complaint further. Carter and Glenn did not inform Foster of any other remedies available to him.

After Foster had made known to Mrs. Hunter his desire to fill one of the GS-5 vacancies Mrs. Hunter began to exclude him from general Procurement office meetings. Plaintiff complained to Mrs. Hunter and was told by her, "Charlie, you've

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gone about as far as you can expect to go in Procurement." Foster then put in for a transfer from Procurement, but was told only that he would be considered for transfer along with GS-3's seeking promotion to GS-4 slots. Foster went once again to see Carter, but Carter referred his case back to Kenneth Hovey, the Procurement representative, MAFB Personnel.

Plaintiff remains in his GS-4 slot in Procurement to this date. Plaintiff alleges that he was well qualifed to fill the two GS-5 slots and that he was discriminated against due to the fact that he is a member of the Negro race, and claims back pay and other relief amounting to Fifteen Thousand ($15,000.00) Dollars for this illegal and unconstitutional discrimination practiced against him.

V

RELIEF REQUESTED

(54.) Plaintiff Foster requests (a) an order requiring the Department of Defense to

increase immediately the GS rating of Plaintiff Charlie H. Foster, Jr. to that of no less than GS-5 and to promote Plaintiff Foster into the next available position in Procurement or elsewhere at MAFB for which he is qualified comparable to his new GS rating; (b) a further order requiring the Defendant Department of Defense to pay back salary for the wages Plaintiff would have earned had he been promoted without regard to race on a nondiscriminatory basis; and (c) an award of damages for the humiliation and embarrassment suffered by Plaintiff as a result of the illegal and unconstitutional racially discriminatory practices.

Respectfully submitted,

s/ J. J. Levin, Jr.

JOSEPH J. LEVIN, JR.
Washington Building
Montgomery, Alabama

ATTORNEY FOR PLAINTIFFS

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EQUAL EMPLOYMENT OPPORTUNITY OFFICERS

12 June 1970

1. MR. JAMES P. GOODE is the Director of Equal Employment Opportunity for the Air Force. His address is: Director of Equal Employment Opportunity (DEEO), Hq USAF (AFPCPL), Washington, D.C. 20330.

2. MR. CLYDE W. BRADLEY, (EEOOC), Programs & Requirements Division, DCS/Personnel, Hq AU, is the Equal Employment Opportunity Officer for Air University. He is located in Building 800, Maxwell Air Force Base; his telephone extension is 5223.

3. MR. JOHN F. AVERY, (EEOOA), Civilian Personnel Officer, 3800th Air Base Wing, serves as the Equal Employment Opportunity Officer For Maxwell and Gunter Air Force Bases. He is located in Building 744, Maxwell Air Force Base; his telephone extension is 5208. He carries out the EEO responsibilities outlined in AFR 40-713.

4. MR. ARTHUR C. CARTER, Hq 3800th Air Base Wing, is the Assistant Equal Employment Opportunity Officer for Maxwell and Gunter Air Forceases. He is located in Building 744, Maxwell Air Force Base; his telephone extension is 5997. His responsibility is to vigorously promote the Equal Employment Opportunity Program and the Maxwell and Gunter Air Force Bases Plan of Action and to make changes as necessary to meet the needs of the installation. He serves as representative of the Commander in community affairs and activities and in dealing with organizations and agencies seeking to improve the employability of the work force, current and potential.

EXHIBIT A
(page 1 of 2)

5. MAJOR SAMUEL M. PIERSON, III, Staff Judge Advocate, Hq 3800th Air Base Wing, is the Alternate Equal Employment Opportunity Officer for Maxwell. He is located in Building 1; his telephone extension is 7646.

6. The following persons have been designated Equal Employment Opportunity Counselors:

Mr. Moses L. Glenn, Chief Counselor, (ECICU-L), Bldg 220, Gunter AFB, 279-3215
Mrs. Ruth Hunter (EMP) Alternate Chief Counselor, Bldg 853, Maxwell AFB, Ext 5319
Mr. Orrin Williams (BTT-7), Bldg 1020, Maxwell AFB, Ext 5584
Mr. George W. Jackson (BSMF), Bldg 1020, Maxwell AFB, Ext 6739
Mrs. Hattie Minter (ASAUR), Bldg 1211, Maxwell AFB, Ext 7641

Employees must consult one of the above EEO Counselors before a formal complaint of discrimination may be filed.

7. This notice supersedes previous notice dated 14 Jan 1970. Remove previous notice from Bulletin Boards and post this notice as required by AFR 40-713.

EXHIBIT A
(page 2 of 2)

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CODE OF FEDERAL REGULATIONS

TITLE 5

§ 713.213 Precomplaint processing.

(a) An agency shall require that an aggrieved person who believes that he has been discriminated against because of race, color, religion, sex, or national origin consult with an Equal Employment Opportunity Counselor when he wishes to resolve the matter. The agency shall require the Equal Employment Opportunity Counselor to make whatever inquiry he believes necessary into the matter; to seek a solution of the matter on an informal basis; to counsel the aggrieved person concerning the merits of the matter; to keep a record of his counseling activities so as to brief, periodically the Equal Employment Opportunity Officer on these activities; and, when advised that a complaint of discrimination has been accepted from an aggrieved person, to submit a written report to the Equal Employment Opportunity Officer, with a copy to the aggrieved person, summarizing his actions and advice both to the agency and the aggrieved person concerning the merits of the matter. The Equal Employment Opportunity Counselor shall, insofar as is practicable, conduct his final interview with the aggrieved person not later than 15 workdays after the date on which the matter was called to his attention by the aggrieved person. The Equal Employment Opportunity Counselor shall advise the aggrieved person in the final interview of his right to file a complaint of discrimination with the organization's Equal Employment Opportunity Officer if the matter has not been resolved to his satisfaction and of the time limits governing the acceptance of a complaint in § 713.214. The Equal Employment Opportunity Counselor shall not reveal the identity of an aggrieved person who has come to him for consultation, except when

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authorized to do so by the aggrieved person, until the agency has accepted a complaint of discrimination from him.

(b) The Equal Employment Opportunity Counselor shall be free from restraint, interference, coercion, discrimination, or reprisal in connection with the performance of his duties under this section.

[34 F.R. 5369, Mar. 19, 1969]

§ 713.214 Filing and presentation of complaint.

(a) *Time limits.* (1) An agency shall require that a complaint be submitted in writing by a complainant or his representative. The agency may accept the complaint for processing in accordance with this subpart only if—

(i) The complainant brought to the attention of the Equal Employment Opportunity Counselor the matter causing him to believe he had been discriminated against within 15 calendar days of the date of that matter or, if a personnel action, within 15 calendar days of its effective date, and

(ii) The complainant submitted his written complaint to the Equal Employment Opportunity Officer within 15 calendar days of the date of his final interview with the Equal Employment Opportunity Counselor.

(2) The agency shall extend the time limits in this section (i) when the complainant shows that he was not notified of the time limits and was not otherwise aware of them, or that he was prevented by circumstances beyond his control from submitting the matter within the time limits, or (ii) for other reasons considered sufficient by the agency.

(b) *Presentation of complaint.* At any stage in the presentation of a complaint, including the counseling stage under § 713.213, the complainant shall be free from restraint, interference, coercion, discrimination, or reprisal

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and shall have the right to be accompanied, represented, and advised by a representative of his own choosing. If the complainant is an employee of the agency, he shall have a reasonable amount of official time to present his complaint if he is otherwise in an active duty status. If the complainant is an employee of the agency and he designates another employee of the agency as his representative, the representative shall be free from restraint, interference, coercion, discrimination, or reprisal, and shall have a reasonable amount of official time, if he is otherwise in an active duty status, to present the complaint.
[34 F.R. 5369, Mar. 19, 1969]

§ 713.215 Rejection or cancellation of complaint.

When the head of the agency, or his designee, decides to reject a complaint because it was not timely filed or because it is not within the purview of § 713.212 or to cancel a complaint because of a failure of the complainant to prosecute the complaint or because of a separation of the complainant which is not related to his complaint, he shall transmit the decision by letter to the complainant and his representative. The decision letter shall inform the complainant of his right to appeal the decision of the agency to the Commission and of the time limit within which the appeal may be submitted.
(E.O. 11491; 3 CFR, 1969 Comp., p.191) [35 F.R. 14917, Sept. 25, 1970]

§ 713.216 Investigation.

(a) The Equal Employment Opportunity Officer shall advise the Director of Equal Employment Opportunity of the acceptance of a complaint. The Director of Equal Employment Opportunity shall provide for the prompt investigation of the complaint. The person assigned to investigate the

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complaint shall occupy a position in the agency which is not, directly or indirectly, under the jurisdiction of the head of that part of the agency in which the complaint arose. The agency shall authorize the investigator to administer oaths and require that statements of witnesses shall be under oath or affirmation, without a pledge of confidence. The investigation shall include a thorough review of the circumstances under which the alleged discrimination occurred, the treatment of members of the complainant's group identified by his complaint as compared with the treatment of other employees in the organizational segment in which the alleged discrimination occurred, and any policies and practices related to the work situation which may constitute, or appear to constitute, discrimination even though they have not been expressly cited by the complainant. Information needed for an appraisal of the utilization of members of the complainant's group as compared to the utilization of persons outside the complainant's group shall be recorded in statistical form in the investigative file, but specific information as to a person's membership or nonmembership in the complainant's group needed to facilitate an adjustment of the complaint or to make an informed decision on the complaint shall, if available, be recorded by name in the investigative file. (As used in this subpart, the term "investigative file" shall mean the various documents and information acquired during the investigation under this section—including affidavits of the complainant, of the alleged discriminating official, and of the witnesses and copies of, or extracts from, records, policy statements, or regulations of the agency—organized to show their relevance to the complaint or the general environment out of which the complaint rose.) If necessary, the investigator may obtain information regarding the membership or nonmembership of a person in the complainant's group by asking each person concerned to provide the

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information voluntarily; he shall not require or coerce an employee to provide this information. The agency shall furnish the complainant or his representative a copy of the investigative file.

(b) The Director of Equal Employment Opportunity shall arrange to furnish to the person conducting the investigation a written authorization (1) to investigate all aspects of complaints of discrimination, (2) to require all employees of the agency to cooperate with him in the conduct of the investigation, and (3) to require employees of the agency having any knowledge of the matter complained of to furnish testimony under oath or affirmation without a pledge of confidence. [34 F.R. 5369, Mar. 19, 1969, as amended at 34 F.R. 13656, Aug. 26, 1969]

§ 713.217 Adjustment of complaint and offer of hearing.

(a) The agency shall provide an opportunity for adjustment of the complaint on an informal basis after the complainant has reviewed the investigative file. If an adjustment of the complaint is arrived at, the terms of the adjustment shall be reduced to writing and made part of the complaint file, with a copy of the terms of the adjustment provided the complainant.

(b) If an adjustment of the complaint is not arrived at, the complainant shall be notified in writing of the proposed disposition thereof. In that notice, the agency shall advise the complainant of his right to a hearing with a subsequent decision by the head of the agency or his designee and his right to such a decision without a hearing. The agency shall allow the complainant 7 calendar days from receipt of the notice to notify the agency whether or not he wishes to have a hearing.

(c) If the complainant fails to notify the agency of his wishes within the 7-day period prescribed in paragraph (b) of this section, the appropriate Equal Employment Opportunity Officer

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may adopt the disposition of the complaint proposed in the notice sent to the complainant under paragraph (b) of this section as the decision of the agency on the complaint when delegated the authority to make a decision for the head of the agency under those circumstances. When this is done, the Equal Employment Opportunity Officer shall transmit the decision by letter to the complainant and his representative which shall inform the complainant of his right of appeal to the Commission and the time limit applicable thereto. If the Equal Employment Opportunity Officer does not issue a decision under this paragraph, the complaint, together with the complaint file, shall be forwarded to the head of the agency, or his designee, for decision under § 713.221.
(E.O. 11491; 3 CFR, 1969 Comp., p.191) [34 F.R. 5369, Mar. 19, 1969; 34 F.R. 9795, June 25, 1969, as amended at 34 F.R. 15595, Oct. 8, 1969; 35 F.R. 14917, Sept. 25, 1970]

§ 713.218 Hearing.

(a) *Appeals examiner.* The hearing shall be held by an appeals examiner who must be an employee of another agency except when the agency in which the complaint arose is (1) the government of the District of Columbia or (2) an agency which, by reason of law, is prevented from divulging information concerning the matter complained of to a person who has not received the security clearance required by that agency, in which event the agency shall arrange with the Commission for the selection of an impartial employee of the agency to serve as appeals examiner. (For purposes of this paragraph, the Department of Defense is considered to be a single agency.) The agency in which the complaint arose shall request the Commission to supply the name of an appeals examiner who has been certified by the Commission as qualifed to conduct a hearing under this section.

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(b) *Arrangements for hearing.* The agency in which the complaint arose shall transmit the complaint file containing all the documents described in § 713.222 which have been acquired up to that point in the processing of the complaint, including the original copy of the investigative file (which shall be considered by the appeals examiner in making his recommended decision on the complaint), to the appeals examiner who shall review the complaint file to determine whether further investigation is needed before scheduling the hearing. When the appeals examiner determines that further investigation is needed, he shall remand the complaint to the Director of Equal Employment Opportunity for further investigation or arrange for the appearance of witnesses necessary to supply the needed information at the hearing. The requirements of § 713.216 apply to any further investigation by the agency on the complaint. The appeals examiner shall schedule the hearing for a convenient time and place.

(c) *Conduct of hearing.* (1) Attendance at the hearing is limited to persons determined by the appeals examiner to have a direct connection with the complaint.

(2) The appeals examiner shall conduct the hearing so as to bring out pertinent facts, including the production of pertinent documents. Rules of evidence shall not be applied strictly, but the appeals examiner shall exclude irrelevant or unduly repetitious evidence. Information having a bearing on the complaint or employment policy or practices relevant to the complaint shall be received in evidence. The complainant, his representative, and the representatives of the agency at the hearing shall be given the opportunity to cross-examine witnesses who appear and testify. Testimony shall be under oath or affirmation.

(d) *Powers of appeals examiner.* In addition to the other powers vested in the appeals

examiner by the agency in accordance with this subpart, the agency shall authorize the appeals examiner to:

(1) Administer oaths or affirmations;

(2) Regulate the course of the hearing;

(3) Rule on offers of proof;

(4) Limit the number of witnesses whose testimony would be unduly repetitious; and

(5) Exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing.

(e) *Witnesses at hearing.* The appeals examiner shall request the agency to make available as a witness at the hearing an employee requested by the complainant when he determines that the testimony of the employee is necessary. He shall also request the appearance of any other employee whose testimony he desires to supplement the information in the investigative file. The appeals examiner shall give the complainant his reasons for the denial of a request for the appearance of employees as witnesses and shall insert those reasons in the record of the hearing. The agency shall make its employees available as witnesses at a hearing on a complaint when requested to do so by the appeals examiner and it is administratively practicable to comply with the request. When it not administratively practicable to comply with the request for a witness, the agency shall provide an explanation to the appeals examiner. If the explanation is inadequate, the appeals examiner shall so advise the agency and request it to make the employee available as a witness at the hearing. If the explanation is adequate, the appeals examiner shall insert it in the record of the hearing, provide a copy to the complainant, and make arrangements to secure testimony from the employee through a written interrogatory. Employees of the agency shall be in a duty status during the time they are made available as witnesses. Witnesses shall be free from restraint, interference, coercion,

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discrimination, or reprisal in presenting their testimony at the hearing or during the investigation under § 713.216.

(f) *Record of hearing.* The hearing shall be recorded and transcribed vertabim. All documents submitted to, and accepted by, the appeals examiner at the hearing shall be made part of the record of the hearing. If the agency submits a document that is accepted, it shall furnish a copy of the document to the complainant. If the complainant submits a document that is accepted, he shall make the document available to the agency representative for reproduction.

(g) *Findings, analysis, and recommendations.* The appeals examiner shall transmit to the head of the agency or his designee (1) the complaint file (including the record of the hearing), (2) the findings and analysis of the appeals examiner with regard to the matter which gave rise to the complaint and the general environment out of which the complaint arose, and (3) the recommended decision of the appeals examiner on the merits of the complaint, including recommended remedial action, where appropriate, with regard to the matter which gave rise to the complaint and the general environment out of which the complaint arose. The appeals examiner shall notify the complainant of the date on which this was done. In addition, the appeals examiner shall transmit, by separate letter to the Director of Equal Employment Opportunity, whatever findings and recommendations he considers appropriate with respect to conditions in the agency having no bearing on the matter which gave rise to the complaint or the general environment out of which the complaint arose.

[34 F.R. 5370, Mar. 19, 1969, as amended at 34 F.R. 13657, Aug. 26, 1969]

§ 713.219 Relationship to other agency appellate procedures.

(a) Except as provided in paragraphs (b) and (c) of this section, when an employee makes a written allegation of discrimination on grounds of race, color, religion, sex, or national origin, in connection with an action that would otherwise be processed under a grievance or appeals system of the agency the agency may process the allegation of discrimination under that system when the system meets the principles and requirements in §§ 713.212 through 713.220 and the head of the agency, or his designee, makes the decision of the agency on the issue of discrimination. That decision on the issue of discrimination shall be incorporated in and become a part of the decision on the grievance or appeal.

(b) An allegation of discrimination made in connection with an appeal under Subpart B of Part 771 of this chapter shall be processed under that subpart.

(c) An allegation of discrimination made in connection with a grievance under Subpart C of Part 771 of this chapter shall be processed under this part.

(E.O. 11491; 3 CFR, 1969 Comp., p. 191) [35 F.R. 14917, Sept. 25, 1970]

§ 713.220 Avoidance of delay.

(a) The complaint shall be resolved promptly. To this end both the complainant and the agency shall proceed with the complaint without undue delay so that the complaint is resolved, except in unusual circumstances, within 60 calendar days after its receipt by the Equal Employment Opportunity Officer, exclusive of time spent in the processing of the complaint by the appeals examiner under § 713.218. When the complaint has not been resolved within this limit, the complainant may appeal to the Commission for a review of the reasons for the delay. Upon review of this appeal, the Commission may require the agency to take special measures to insure prompt processing

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of the complaint or may accept the appeal for consideration under § 713.234.

(b) The head of the agency or his designee may cancel a complant if the complainant fails to prosecute the complaint without undue delay. However, instead of canceling for failure to prosecute, the complaint may be adjudicated if sufficient information for that purpose is available.

(E.O. 11491, 3 CFR, 1969 Comp.) [34 F.R. 5370, Mar. 19, 1969, as amended at 35 F.R. 14917, Sept. 25, 1970]

§ 713.221 Decision by head of agency or designee.

(a) The head of the agency, or his designee, shall make the decision of the agency on a complaint based on information in the complaint file. A person designated to make the decision for the head of the agency shall be one who is fair, impartial, and objective.

(b) (1) The decision of the agency shall be in writing and shall be transmitted by letter to the complainant and his representative.

(2) When there has been a hearing on the complaint, the decision letter shall transmit a copy of the findings, analysis, and recommended decision of the appeals examiner under § 713.218 (g) and a copy of the hearing record. The decision of the agency shall adopt, reject, or modify the decision recommended by the appeals examiner. If the decision is to reject or modify the recommended decision, the decision letter shall set forth the reasons for rejection or modification.

(3) When there has been no hearing and no decision under § 713.217(c), the decision letter shall set forth the findings, analysis, and decision of the head of the agency or his designee.

(c) The decision of the agency shall require any remedial action authorized by law determined

to be necessary or desirable to resolve the issues of discrimination and to promote the policy of equal opportunity.

(d) The decision letter shall inform the complainant of his right to appeal the decision of the agency to the Commission and of the time limit within which the appeal may be submitted. (E.O. 11491; 3 CFR, 1969 Comp., p.191) [35 F.R. 14917, Sept. 25, 1970]

§ 713.222 Complaint file.

The agency shall establish a complaint file containing all documents pertinent to the complaint. The complaint file shall include copies of (a) the written report of the Equal Employment Opportunity Counselor under § 713.213 to the Equal Employment Opportunity Officer on whatever precomplaint counseling efforts were made with regard to the complainant's case, (b) the complaint, (c) the investigative file, (d) if the complaint is withdrawn by the complainant, a written statement of the complainant or his representative to that effect, (e) if adjustment of the complaint is arrived at under § 713.217, the written record of the terms of the adjustment, (f) if no adjustment of the complaint is arrived at under § 713.217, a copy of the letter notifying the complainant of the proposed disposition of the complaint and of his right to a hearing, (g) if decision is made under § 713.217 (c), a copy of the letter to the complainant transmitting that decision, (h) if a hearing was held, the record of the hearing, together with the appeals examiner's findings, analysis, and recommended decision on the merits of the complaint, (i) if the Director of Equal Employment Opportunity is not the designee, the recommendations, if any, made by him to the head of the agency or his designee, and (j) if decision is made under § 713.221, a copy of the letter transmitting the decision of the head of the

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agency or his designee. The complaint file shall not contain any document that has not been made available to the complainant or to his designated physician under § 294.401 of this chapter.
(E.O. 11491; 3 CFR, 1969 Comp., p.191) [35 F.R. 14917, Sept. 25, 1970]